No. [redacted]026 72

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Supreme Court of the United States

TERM 1941

GEORGE T. MORTIMER,
Petitioner,

—*against*—

UNITED STATES OF AMERICA,
Respondent.

314-616

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

Erroneous Construction and Application of recent Federal Statute 28 U. S. C. A. Sections 695 and 695-H, with respect to admissibility of incompetent hearsay testimony and documents. Conflict between decision of the Circuit Court of Appeals, Second Circuit, and decisions of Circuit Court of Appeals, Ninth Circuit, on construction of said Federal Statute. Also, apart from the Statute, admitted conflict between decision of Circuit Court of Appeals, Second Circuit, and decision of Circuit Court of Appeals, Sixth Circuit as to admissibility of incompetent hearsay evidence. Prejudicial error in compelling petitioner to testify in contravention of immunity guaranteed by United States Constitution, Fifth Amendment. Prejudicial errors affecting substantial rights of petitioner.

JOHN T. DOOLING,
Attorney for Petitioner.

THEODORE KIENDL,
CHRISTOPHER S. SARGENT,
Of Counsel.

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Supreme Court of the United States

TERM 1941

GEORGE T. MORTIMER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, George T. Mortimer, respectfully prays that a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit issue to review the judgment of that Court, entered on April 2nd, 1941, affirming judgment of the District Court of the United States for the Southern District of New York, entered February 19, 1940, convicting the petitioner of the crimes of using the mails to defraud, in violation of Title 18 U. S. C., Section 338, and of conspiracy to commit said offense against the United States in violation of Title 18 U. S. C.; Section 88.

Opinion Below.

The Opinion of the Circuit Court of Appeals, filed March 17th, 1941 (pp. 3494-3503*), is reported in 118 F. 2d. 266. The United States District Court rendered no opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on April 2, 1941 (p. 3504), and order for issuance of mandate was made by the Circuit Court on April 2, 1941. No mandate has been issued by said Circuit Court because an order was made by said Court on April 2nd, 1941, staying issuance of the mandate of that Court pending an application to this Court for a writ of *certiorari*. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (U. S. C. Title 18, Sec. 347), and Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court, May 7, 1934.

Constitution and Statutes Involved.

CONSTITUTION OF THE UNITED STATES; Article V of Articles in addition to and amendments of the Constitution of the United States of America.

"No person * * * shall be compelled in any criminal case to be witness against himself * * *".

"TITLE 18, U. S. C. A.

"Section 632: DEFENDANTS IN CRIMINAL CASES. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the

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* Numbers in parentheses refer to folios in Record except where otherwise indicated.

commission of crimes, offenses, and misdemeanors, in the United States Court, * * * in any State * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

"TITLE 18, U. S. C. A.

Sec. 88 (Criminal Code, Section 37.) CONSPIRING TO COMMIT OFFENSE AGAINST UNITED STATES.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

TITLE 28, U. S. C. A.

Writings and Records made in the Regular Course of Business.

"Sec. 695. ADMISSIBILITY: In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, in-

cluding lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind * * *".

"TITLE 28, U. S. C. A.

"Sec. 695-h: PROSPECTIVE NATURE OF SUB-CHAPTER. Section 695 * * * shall be prospective only, and not retroactive."

Summary and Short Statement of Matter Involved.

I.

Petitioner is charged with violation of the mail fraud statute, Title 18, Section 338, and the conspiracy statute, Title 18, Section 88 of the United States Code. Other defendants named in the indictment were New York Title & Mortgage Company (hereinafter referred to as "Company").

Upon the trial the Government withdrew Counts 7, 8 and 9; and at the close of the trial, upon Government's motion, the indictment was dismissed as to all corporate defendants. After a trial lasting 12 weeks defendant Shields was acquitted on all counts, defendant Breitwieser was acquitted on the conspiracy count and found guilty on counts 1, 2, 3, 4, 5, 6, 10, 11, 12 and 13; defendant Williams was found guilty on counts 1, 2, 3, 4, 5, 6, 10, 11 and 14, and not guilty on counts 12 and 13. Petitioner was found guilty on counts 1, 2, 3, 4, 5, 6, 10, 11 and 14, and not guilty on counts 12 and 13, and was sentenced to 2 years on each count, sentence to run concurrently, and fined $5,000.

Petitioner alone appealed from the judgment of conviction.

II.

Petitioner was a real estate man of wide experience; prior to 1925 he had specialized in the management of large properties. In 1925 he retired from active business, on advice of his physician, and until he assumed the Presidency of the Company, June 1, 1930, devoted himself to restoring his impaired health and attending to his own personal and his family's business affairs (4661-67).

The Company: The Company was organized in 1901 with a paid-in capital of $2,000,000. In June 1930, when petitioner became its President, it had assets of approximately $67,000,000 (Defts'. Ex. Z; 9922-24); its main office was at 141 Broadway, New York City, with eleven (11) branch offices in the Metropolitan District. In 1930, 1931 and 1932, it had about 1700 employees and about 60 executive and administrative officers (4691-2). It operated under the Insurance Laws of the State of New York, and under the supervision of the Insurance Department; its affairs and books were regularly audited by the State. Each year it filed its Annual Report and Financial Statement with the Insurance Department, and in 1932 it filed special Monthly Reports.

Petitioner's Duties as President: At no time was petitioner either the Company's Chief Executive Officer (4920) or its policy forming officer, or general manager of its affairs. Petitioner was President from June 1930 to November, 1932. From June 1, 1930 to April 21, 1931, the Chief Executive Officer, and the one responsible for the policies of the Company was defendant Kahler. From April 21, 1931 until November 30th, 1932, defendant Williams was the General Manager and Chief Executive Officer; he had charge of and managed the affairs of the Company and actively supervised all Departments. During the latter part

of 1931 and until November 30th, 1932, when petitioner resigned, petitioner devoted substantially all his time to the management of the rapidly accumulating volume of real estate which the Company had acquired, through foreclosures, or managed under assignments of rent (4773; 5060-61; 5352; 5375). As of November 30, 1932, 2,566 separate and distinct pieces of property, of a total value of over $200,000,000, were under his management (Government's Ex. 546; 2934). This was the real work to which petitioner gave his attention in the interest of the Company and its investors. In view of the fact that petitioner's time and energies were very largely employed, during 1931 and 1932, in the management of the Company's acquired real estate, his other activities during that period, consisting of attendance at meetings of the Loan and Executive Committees, his occasional inspection of properties, and his attendance, as a Director, at meetings of the Board, were but an incidental part of petitioner's work. Although President in name, his real function was that of manager of the Company's real estate,—the special emergency problem resulting from the depression and the one assigned to him because of his experience in that field.

Financial Condition of the Company: Government witness Obermayer, the Company's Treasurer, testified that the Company's Annual Financial Statement and Report as of December 31st, 1931 (Gov. Ex. 501), which was prepared, signed and sworn to by him, and defendants Burdett and Breitwieser, *was correct* (1217-18), and that "It was a true Statement of the conditions of the Company at that time" (1334-35). He also testified, with respect to the Company's Annual Report of condition as of December 31st, 1932 (Gov. Ex. 502), prepared by him and filed with the Department of Insurance, that he thought the Company was in a sound financial position,

and solvent (1252-3). As of December 31st, 1932 the Company had, according to its Annual Statement, assets of $55,000,000. in excess of direct liabilities (exclusive of contingent liabilities on its guaranteed mortgage certificates), a surplus of $20,000,000. and undivided profits of over $11,000,000. Its cash on hand or deposited in banks amounted to approximately $9,000,000 (1252-53). Obermayer further testified that he

"believed in the integrity of the Company" (1251-1254),

and that the Company's guaranty fund was *intact* in December, 1932 (1396-97). Each and every one of the special Company Monthly Reports prepared by him during 1932 shows that the Company was solvent. He testified:

"I signed those reports; and they were correct" (1251).

Petitioner's Good Faith: Definite proof of petitioner's good faith and of his innocence of the charges of using the mails to defraud and of conspiring so to do is shown by the fact that petitioner, in January, 1931, directed that all correspondence and inquiries from investors as to mortgages and certificates be answered promptly by letter (Defts'. Ex. O, (2)), that petitioner, and his family, were substantial investors in the stock of the defendant Company and together owned stock of the value of approximately $750,000., which stock (converted into stock of the Manhattan Company about December, 1929) petitioner and his family still hold, that petitioner throughout 1932 opposed the declaration and payment of dividends by the Company (4938-9), that petitioner and his family were substantial investors (throughout the entire period he was President), in the mortgages and mortgage certificates issued by the Company, —their investments aggregating $172,200., of which $64,000. were made from January to August, 1932, and sustain peti-

tioner's contention that there is no substantial proof of his alleged guilt and that the learned Circuit Court of Appeals erred in affirming petitioner's conviction.

The Questions Presented.

1. Whether the trial Court erred in ruling that petitioner, on cross examination, over objections and exceptions, should testify that he did not accept an invitation from Government counsel to appear and testify before the Federal Grand Jury investigating this case?

2. Whether the trial Court erred in admitting in evidence, over objections and exceptions of petitioner, the incompetent hearsay testimony of Government witness Karcher concerning alleged tax arrears, and the incompetent hearsay charts, summaries and graphs prepared by Karcher allegedly showing said arrears?

3. Whether the Circuit Court of Appeals erred in its construction and application of the recent Federal Statute, Title 28 U. S. C. A., Secs. 695 and 695-h?

4. Whether the Circuit Court of Appeals erred in its construction and application of the Federal Conspiracy Statute, Title 18, Sec. 88 U. S. C. A.?

5. Whether the trial Court erred in holding that the conspiracy count (Fourteenth Count of Indictment) charges a crime as a matter of law?

Reasons for Allowance of Writ.

This application to permit a review of the judgment of the Circuit Court of Appeals is grounded on the following special and important reasons:

1. The Circuit Court of Appeals, in sustaining the trial Court's ruling which compelled petitioner, on cross examination, over objections and exceptions, to testify that he did not accept the invitation of Government counsel to appear and testify before the Federal Grand Jury investigating this case, has decided an important question of Federal Constitutional law which has not been, but should be, settled by this Court (Constitution of the United States; Fifth Amendment; Title 18, Sec. 632, U. S. C. A. *Counselman* v. *Hitchcock,* 142 U. S., 547). The public interest will be promoted by the prompt settlement in this Court of said question.

2. The Circuit Court of Appeals, in holding that the trial Court properly received in evidence, over the objections and exceptions of petitioner, the incompetent hearsay testimony of Government witness Karcher concerning alleged tax arrears and the incompetent hearsay charts, summaries and graphs prepared by Karcher showing said alleged arrears, has so far sanctioned a departure, by the lower Court, from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision (*Burton* v. *Driggs,* 87 U. S. 125; *The Great Northern Railway* v. *Washington,* 300 U. S. 154; *Queens* v. *Hepburn,* 11 U. S. 290).

3. The Circuit Court of Appeals, in construing and applying Federal Statute Title 28, U. S. C. A., Sections 695, and 695(h), has (1) rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter (*Greenbaum* v. *United States,* 98 F. 2d, 574 (C. C. A. Ninth Circuit); *Shreve* v. *United States,* 103 F. 2d, 796 (Ninth Circuit), and (2) has decided an important question of Federal law which has not been, but should be, settled

by this Court; and (3) has decided it in such a way that the public interest will be promoted by prompt settlement in this Court of the questions involved (*Shepard* v. *United States,* 290 U. S. 96).

4. The Circuit Court of Appeals in affirming petitioner's conviction rendered a decision in direct conflict with a decision of the Sixth Circuit Court of Appeals on the important question of the admissibility of hearsay testimony (*Morton Timber Company* v. *United States,* 91 F. 2d, 884, 889).

5. The Circuit Court of Appeals, in sustaining the conspiracy count (the Fourteenth Count of the Indictment), has (a) decided a Federal question in a way probably in conflict with applicable decisions of this Court (*United States* v. *Hess,* 124 U. S. 483; *United States* v. *Carll,* 105 U. S. 611; *United States* v. *Simmons,* 96 U. S. 360; *United States* v. *Cruikshank,* 92 U. S. 542; *Pettibone* v. *United States,* 148 U. S. 197), and (b) has decided a Federal question in conflict with the decisions of other Circuit Courts of Appeals on the same matter (*Miller* v. *United States,* 133 Fed. 337 (C. C. A. 8); *Etheredge* v. *United States,* 186 Fed. 434 (C. C. A. 5).

6. The Circuit Court of Appeals in affirming petitioner's conviction has, in its construction and application of the Federal Conspiracy Statute, 18 U. S. C. A., Section 88 (Criminal Code Section 37), (a) rendered a decision in conflict with the decisions of other Circuit Courts of Appeals, on the same matter (*Graham* v. *United States,* 15 F. 2d 740 (C. C. A. 8); *Weniger* v. *United States,* 47 Fed. 2d 692 (C. C. A. 9); *Dahly* v. *United States,* 50 Fed. 2d 37 (C. C. A. 8); *Mazurosky* v. *United States,* 100 F. 2d 958 (C. C. A. 9); and *Copeland* v. *United States,* 90 F. 2d 78

(C. C. A. 5); and (b) has decided a Federal question in a way probably in conflict with applicable decisions of this Court (*United States* v. *Rabinowich,* 238 U. S. 78; *United States* v. *Kissel,* 218 U. S. 601, *Durland* v. *United States,* 161 U. S. 306). The public interest will be promoted by prompt settlement in this Court of the questions involved.

III.

To accomplish petitioner's conviction the prosecution, over objections and exceptions, compelled petitioner to testify that he did not accept an invitation of Government's counsel to appear and testify before the Federal Grand Jury investigating this case, by which improper cross examination the Jury was induced to draw inference on inference prejudicial to petitioner, and petitioner's Constitutional right against self-incrimination was violated; introduced into evidence, over objections and exceptions, incompetent hearsay testimony, charts, graphs and summaries of Government witness Karcher concerning the controversial issue of alleged tax arrears.

IV.

Petitioner contends that his conviction rests upon nothing more substantial than suspicion, which was based on nothing more than his innocent association, as President, with the men who actually conducted and were responsible for the Company's mortgage and mortgage certificate business and the sale of said securities; that such suspicion does not rise to the dignity of proof, and is insufficient to sustain his conviction (*Mazurosky* v. *United States,* 100 F. 2d 958, 961, C. C. A. 9, 1939; *Copeland* v. *United States,* 90 F. 2d 78, C. C. A. 5, 1937); that, under the well-established rule that the evidence adduced must not only be consistent with the guilt of a defendant but also inconsistent

with his innocence (*Shannabarger* v. *United States*, 99 F. 2d 957; *Dickerson* v. *United States*, 18 F. 2d 887; *Spalitto* v. *United States*, 39 F. 2d 782; *Salinger* v. *United States*, 23 F. 2d 48; *Langer* v. *United States*, 76 F. 2d 817), petitioner's conviction was improper; that the Conspiracy Count (Fourteenth Count of the Indictment) is defective as a matter of law; and that the Circuit Court of Appeals erred in affirming petitioner's conviction.

V.

Petitioner contends that *United States* v. *Dilliard* (101 F. 2d 829, 2 Cir.) and *United States* v. *Bob*, 106 F. 2d 37, 2 Cir.), cited by the learned Circuit Court of Appeals, are so radically different from the instant case as to have no application thereto.

WHEREFORE, your petitioner prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all procedings of said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed, and the petitioner be granted such other and further relief as may seem proper.

Dated: New York, N. Y., May 6th, 1941.

GEORGE T. MORTIMER,
Petitioner.

By JOHN T. DOOLING,
Counsel for Petitioner.

THEODORE KIENDL,
CHRISTOPHER S. SARGENT,
Of Counsel.

IN THE

Supreme Court of the United States

TERM—1941

GEORGE T. MORTIMER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The Opinion of the Circuit Court of Appeals for the Second Circuit is reported in 118 F. 2d. 266. It is annexed to the certified transcript of the Record filed herein (3494-3503).*

No opinion was rendered by the United States District Court for the Southern District of New York.

II.

Jurisdiction.

The Judgment sought to be reviewed was entered on April 2, 1941. The jurisdiction of this Court is based upon Judicial Code, Section 240 (a), as amended, U. S. C. Title 28, Sec. 347.

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* Numbers in parentheses refer to folios in printed transcript of Record, except as otherwise indicated.

III.

Statement of the Case.

A summary statement of the case is set forth in the petition, and is, therefore, not repeated here. A summary of the argument is set forth in the Index.

IV.

Specification of Assigned Errors To Be Urged.

It is intended to urge all the Errors assigned (R. 3398-3486), including the following:

1. It was error to compel petitioner, over objections and exceptions, to testify, on cross examination, that he did not accept an invitation from Government Counsel to appear and testify before the Federal Grand Jury investigating this case; and the learned Circuit Court of Appeals erred in sustaining the Trial Court's rulings which compelled the petitioner to so testify.

2. It was error to admit in evidence, over petitioner's objections and exceptions, the incompetent hearsay testimony of Government witness Karcher concerning alleged tax arrears and in admitting in evidence the incompetent hearsay charts, summaries and graphs prepared by Karcher and allegedly showing such arrears; and the learned Circuit Court of Appeals erred in holding that the Trial Court properly received in evidence the said testimony of Government witness Karcher and the said Karcher charts, summaries and graphs.

3. The learned Circuit Court of Appeals erred in its construction and application of the recent Federal Statute Title 28 U. S. C. A. Sections 695 and 695H, by which erroneous construction and application the Circuit Court of Appeals attempted to justify the admission in evidence of the incompetent hearsay Karcher testimony, charts, summaries, and graphs relating to said alleged tax arrears.

4. In view of the fact that the Conspiracy Count (Fourteenth Count of the Indictment) fails to charge a crime, in that the facts alleged are wholly insufficient as a matter of law, the Trial Court erred in denying petitioner's motion to dismiss the Indictment at the close of the Government's case; and the learned Circuit Court of Appeals erred in affirming petitioner's conviction based on an Indictment insufficient in law.

5. The learned Circuit Court of Appeals erred in its construction and application of the Federal Conspiracy Statute, Title 18 U. S. C. A. Sec. 88 (Criminal Code Sec. 37),—to the particular facts of this case as they related to petitioner.

Argument.

POINT I.

It was reversible error to compel petitioner on cross examination, over objections and exceptions, to testify that he did not accept an invitation from Government Counsel to appear and testify before the Federal Grand Jury investigating this case. The learned Circuit Court of Appeals erred in affirming petitioner's conviction, brought about, in part, by this improper prejudicial cross examination.

The very first question addressed to petitioner on cross examination by counsel for the Government involved an invitation to him from Government Counsel to appear before the Federal Grand Jury investigating this case and tell his side of the case. The question was objected to; the objection was overruled and exception taken (4946-48). Petitioner was then asked what happened when he appeared before the Grand Jury. This question was likewise objected to and exception taken; but the question was not answered, and the Prosecutor proceeded with another question (4949-51).

Petitioner was then asked if he accepted the invitation to appear before the Grand Jury and testify, and, over objection and exception, was compelled to testify that he did not accept the invitation. There is nothing anywhere in the record to indicate what happened when petitioner appeared before the Grand Jury, and no attempt was made to prove that he refused to testify or invoked his constitutional rights at that time.

The evidence thus elicited from petitioner enabled the Trial Jury to infer that he had refused to testify before the Grand Jury because of consciousness of guilt or

some fear that his testimony before that body might tend to incriminate him, or because of some other undisclosed factor equally damaging to his defense. Coming as it did at the very beginning of his cross examination, it is obvious that this testimony immediately prejudiced petitioner in the minds of the Jury,—as it was intended so to do. It is impossible to say that this highly prejudicial testimony did not substantially affect the result of the trial as far as petitioner is concerned. The evidence should not have been admitted.

If followed to its logical conclusion, the sanction and approval of this method of cross examination by a Prosecutor would prevent any indicted defendant from testifying in his own defense at the trial of an indictment unless he had testified, in advance, before the Federal Grand Jury investigating his case. Such procedure, or rule, would compel every prospective defendant under criminal investigation before a Federal Grand Jury to surrender the constitutional immunity and protection guaranteed him under the provisions of the United States Constitution that

> "no person shall be compelled in any criminal case to be a witness against himself * * *" (Amendment No. 5),

and to voluntarily appear and testify before that body (thereby giving the prosecution the benefit of such Grand Jury testimony, which of course could be used against the prospective defendant on the trial), on penalty that if the prospective defendant did not accept the invitation of Government's Counsel and appear before the Grand Jury and testify his failure or refusal to do so would be used against him upon the trial. In either event the damage to every prospective defendant would be irreparable, and as a practical matter would seriously deprive defendants of any real opportunity to defend themselves.

Although the question involves so serious a matter as the invasion of and the encroachment upon the constitutional rights and immunities of a citizen which guarantee him protection against self incrimination, the precise point has never been passed upon by this Court.

Raffel v. *United States* (271 U. S. 494); *United States* v. *Buckner* (108 F. 2d. 921; certiorari denied 309 U. S. 669); *Tomlinson* v. *United States* (93 F. 2d. 652, certiorari denied 303 U. S. 646), and *Commonwealth* v. *Smith* (163 Mass. 411), cited by the learned Circuit Court as justifying this improper prejudicial cross examination of petitioner, are readily distinguishable.

Raffel v. *United States, supra*: In that case there were two trials. On the first trial the defendant did not testify; the jury disagreed. On the second trial he was asked by the Court to explain why he had not testified in his own behalf at the first trial. This Court held it was not error to require the defendant when he took the stand in his own behalf *at a second trial* to disclose that he had not testified at the first trial. The situation presented in that case was essentially different from the situation presented in the instant case in that, in the *Raffel* case, the defendant was actually on trial before a Petit Jury in both instances, was represented by counsel, and was protected by all the privileges of cross examination, confrontation, hearing all of the evidence and presenting such witnesses as he might desire; whereas in the instant case the Grand Jury proceedings were secret, and none of the protections above set forth would have been available to petitioner if he had accepted the invitation to testify.

United States v. *Buckner, supra*: In that case the defendant refused to testify before the Securities and Exchange Commission regarding a tipster profit-sharing scheme he had arranged with a speculator named Breen. At the trial of his indictment *the defendant Buckner opened the door*

to the Government Attorney, on his direct examination, regarding that very scheme. On cross examination Buckner declared there was nothing wrong with this scheme, and the Prosecutor was then permitted to bring out that Buckner had claimed his privilege before the Securities and Exchange Commission and was then asked and compelled to testify why he claimed the privilege if there was nothing wrong with the scheme. Clearly in that case, as the decision of the Circuit Court of Appeals (Second Circuit) stated, "The Breen deal was certainly in issue"; and under those circumstances the Court found that there was no reason why his refusal to testify before the Securities and Exchange Commission should not be used against him.

Tomlinson v. *United States, supra*: That case involved a situation where the defendant Tomlinson had voluntarily testified *on direct examination* as to why he had not appeared before the Federal Grand Jury.

But at the trial of the indictment in the instant case petitioner *was not* interrogated about and did not testify upon his direct examination regarding the Grand Jury incident. Neither petitioner nor his counsel had referred in any way upon direct examination to the Grand Jury investigation or the invitation from Government's counsel to petitioner to appear before the Grand Jury and testify. In the face of these facts the situation definitely was one where petitioner had neither done nor said anything on his direct examination by which the door to the improper prejudicial cross examination was opened. In fact there was no proof that petitioner had claimed any privilege before the Federal Grand Jury.

The obviously improper and prejudicial purpose behind the Prosecutor's cross examination of petitioner was that the Trial Jury should draw *an inference* from an assumed circumstance,—of which there was absolutely no proof,—i.e. that from the fact petitioner appeared but did not testify before the Federal Grand Jury the Trial Jury would *draw*

the inference that he had asserted, before the Grand Jury, his constitutional privilege against self-incrimination, and then from that inference draw *another inference* that petitioner had asserted his constitutional privilege before the Grand Jury because of some consciousness of guilt or some fear that his testimony before that body would incriminate him.

Independent of the constitutional question involved this was prejudicial error of a most serious character. It is well settled that a presumption cannot be based upon a presumption; or an inference drawn from an inference. (*Brady* v. *United States*, 24 F. 2d. 399, 403 (C. C. A. 8); *Vernon* v. *United States*, 146 Fed. 121, 126 (C. C. A. 8); *Freeman* v. *United States*, 20 F. 2d. 748 (C. C. A. 3).)

It was reversible error for the Trial Court to deprive petitioner of the constitutional safeguards with which he should have been surrounded in order to prevent the Trial Jury from reaching the conclusion, which undoubtedly it did reach, that there was something incriminating in his failure to tell his story to the Federal Grand Jury investigating this case. That this was not a mere technical error is illustrated by the very recent Opinion of this Court in *Bruno* v. *United States*, 308 U. S. 287. The harm done to petitioner's defense was not remedied by anything which transpired thereafter; and it is our submission that once this testimony, on petitioner's compulsory cross examination, was admitted, nothing could thereafter be done to enable him to overcome its prejudicial effect. On the contrary, this prejudicial effect was heightened when the Prosecutor, at the close of his summation, stated:

> "* * * that grand jury heard some of these defendants, and you have heard from the witness stand that some of them did not appear of their own volition,—of their own volition they did not appear. The Grand Jury

acted in its capacity, and it did what I presume it felt was its duty and filed this indictment here" (6974).

The irreparable harm done petitioner in the minds of the Trial Jury was thus intentionally and strikingly enlarged by the above last minute statement of the Prosecutor.

The situation in the instant case comes within the principles stated and applied by this Court in

Counselman v. *Hitchcock,* 142 U. S. 547,

where this Court said, at page 582:

> "* * * illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

The limitations on the extent to which an indicted defendant may be cross examined at a trial of the indictment and the extent to which testimony so elicited may be used against him are illustrated by *People* v. *Brown* (72 N. Y. 571, 573), *People* v. *Michor* (226 App. Div. 569), *People* v. *Russo* (251 App. Div. 176), *Matter of Doyle* (257 N. Y. 244), in an opinion by the late Chief Justice Cardozo, and in *People ex rel. Lewisohn* v. *O'Brien* (176 N. Y. 253).

In sustaining the Trial Court's rulings which forced petitioner, on cross examination and over objections and exceptions, to admit that he did not accept the invitation of Government Counsel to appear and testify before the Federal Grand Jury investigating this case, the Circuit Court of Appeals has decided an important question of Federal Constitutional law which has not been, but should be, settled by this Court. The public interest will be promoted by the prompt settlement in this Court of said question.

POINT II.

The learned Circuit Court of Appeals erred in holding that the Trial Court properly received in evidence the incompetent hearsay Karcher testimony, charts, summaries and graphs.

A.

The Incompetent Hearsay Nature of Government Witness Karcher's Testimony, Charts, Summaries and Graphs.

One of the material issues at the trial involved alleged misrepresentations and concealment by the defendants of alleged tax arrears against properties securing the mortgages and certificates sold. Charts, summaries and graphs prepared by Government witness Karcher, indicating that a large percentage of the face amount of all mortgages in the Group Series,—which were the securities back of most of the participating guaranteed certificates—were received in evidence, as was also his testimony based thereon. The information contained in these charts, graphs and summaries constituted the basis and source of Karcher's testimony with respect to the alleged tax arrears, and these charts, graphs and summaries were, in turn, based on the incomplete in-

vestigations conducted by four (4) other Government employees,—only one of whom was called by the prosecution. Petitioner contends that (1) the Government's failure to call the witnesses essential to establish the alleged authenticity and correctness of these charts, graphs and summaries stamped them as incompetent hearsay, and they should have been excluded; and (2) that it also stamped all of Karcher's testimony relating to said alleged tax arrears as incompetent hearsay, and his testimony should have been excluded under the familiar rule that said witness's testimony was mere hearsay, and (3) that said charts, graphs and summaries should first have been verified and their correctness attested by other than hearsay evidence before they were received in evidence.

Karcher admitted that his testimony, charts, graphs and summaries concerning the alleged tax arrears on properties securing guaranteed mortgages and mortgage certificates were not based on his own personal investigation, but on what his assistants *reported to him* (1688, 1689, 1690, 1695, 1751, 1763, 1769, 1803, 1805, 1915, 1932, 1934, 1943, 2053, 2114, 2117, 2132, 2219, 2293).

The Company's own arrears cards could not be used as the source of information to determine the existence of alleged tax arrears, if any, because of the fact that the dates of payments of taxes were not entered on those arrears cards. If and when an owner exhibited his receipted tax bill, then only the date when the receipted tax bill was exhibited to the Company, would be stamped on the arrears card (2233; 3417-22). For this reason it became necessary for the Government's investigators, on the disputed question of alleged tax arrears, to examine the tax records at the New York City Tax Collector's offices in the Boroughs of Manhattan, Bronx, Kings and Queens.

But competent proof of the alleged tax arrears was lacking because the Prosecutor failed (a) to call as witnesses

all the men employed by the Government who it was claimed checked the alleged arrears in the various offices of the City Collector, and (b) to offer any competent proof of the alleged unpaid taxes claimed to have been disclosed on the tax records of the City Collector, and (c) to offer any competent proof of the alleged unpaid taxes claimed to have been disclosed on the tax records of the City Collector's offices,—said tax records not being in evidence in this case.

Government witness Browner, one of the men who claimed to have done some of the checking of the alleged tax arrears, was the only one of Karcher's assistants called to testify (2417-51). Mr. Tollette, Government investigator, was not called as a witness, although the Prosecutor knew where he was,—Fort Worth, Texas (1688); nor was J. E. Daly called, although he was actually in the court room during the trial (1688), nor E. M. Ward, each of whom Karcher testified did some of the work in connection with the Government's alleged investigation of the tax records (1688-89) called as witnesses. At the time of their alleged investigation of alleged tax arrears, Browner, Tollette, Ward, and Daly were special Government Agents *attached to the F. B. I.* (1608-9). Browner testified that he worked with Tollette, and that as Browner called off the information as to alleged arrears from the tax records, Tollette wrote something on the cards (2436-40). According to Browner, there was a separate card for each mortgage checked as to alleged arrears. "These cards were taken with us to the County Tax Offices and on which were made a record of the tax payments of the property, and which was marked on the cards" (2421). These work cards of said F. B. I. agents, which allegedly contained the information concerning the alleged tax arrears affecting each mortgage under investigation (2423), were not even offered in evidence by the Prosecutor. The same procedure was claimed to have

been followed in Group Series C-2, F-1, and the others. No effort was made to verify unpaid taxes by communicating with owners of the mortgaged properties to ascertain if the taxes had actually been paid though not yet entered or posted in the records of the Tax office, or to learn whether court proceedings had been commenced by the owners for reduction, remission, or cancellation of taxes (2445), pending which court proceedings the owners would, quite properly, not pay the taxes until the amount in dispute had finally been determined by the Court in such proceedings.

We again call attention to the fact that the tax records of the City of New York were not put in evidence and were not before the Court and Jury. As they were records from which the information was claimed to have been gathered to ascertain the alleged tax arrears on the various mortgaged properties, it was incumbent on the prosecution to *either* introduce these tax records into evidence, *or* furnish other non-hearsay proof of alleged non-payment of taxes claimed to be in arrears. There was a simple method of proof of alleged tax arrears, namely, a Certificate from the City treasurer of the City of New York (*N. Y. Civil Practice Act, Sec. 382*), or a search by a title or insurance abstract company (*N. Y. Civil Practice Act, Sec. 385*). The prosecution produced neither.

Consequently, even if it is assumed, *arguendo,* that the tax arrears reports of Browner and Tollette were competently proven, they would still be inadmissible as they were based on tax records not in evidence.

The incompetent hearsay Karcher charts, summaries and graphs, and the hearsay Karcher testimony based thereon, with their astronomical percentages and figures of alleged tax arrears were unquestionably most impressive in the minds of the Jury, as they permitted the Jury to reach the conclusion that the Company's guaranteed mortgages and certificates were being sold to the investing public at a time

when a large percentage of the mortgages were in arrears as to taxes. Thus the receipt in evidence of the incompetent hearsay Karcher testimony and documents, permitted the Jury to draw inferences adverse to petitioner, which would not have been drawn had said testimony and Exhibits been excluded altogether,—as they should have been. It requires absolutely no speculation to reach the conclusion that petitioner was prejudiced, beyond measure, by the extremely damaging Karcher testimony and documents relating to the alleged tax arrears.

B.

Error Committed by the Circuit Court of Appeals in Connection With the Incompetent Hearsay Karcher Testimony, Charts, Summaries and Graphs.

The learned Circuit Court in an endeavor to justify the above stated prejudicial error states in its Opinion of affirmance that

"the reliability of the charts is not questioned."

Such a conclusion by the learned Circuit Court, in face of petitioner's repeated objections to the reception in evidence of Karcher's testimony and Exhibits, is difficult to understand. The incompetency of Karcher's testimony, charts and summaries was questioned not once but again and again, because they had no foundation other than hearsay. The fact that petitioner was deprived of the opportunity of confrontation of the several investigators, the special Government agents attached to the F. B. I., and of subjecting each one of them and their alleged labors and investigations to cross examination prevented and hindered petitioner from any actual demonstration of the utter unreliability of the conclusions put before the Jury with respect to the alleged tax arrears.

Again, in endeavoring to sustain the grossly prejudicial error committed against petitioner, the learned Circuit Court stated

> "and, several of the defendants and their witnesses checked the figures and found no disparity, rather indeed that Karcher had been very fair."

But the work and figures of the F. B. I. agents, *who were not called* by the Government, were not checked by any defendant or any witness for any one of the defendants. What the petitioner did, after Karcher's grossly prejudicial hearsay testimony and Exhibits had been received in evidence, was to call Louis Kramer, a certified public accountant, who had prepared certain summaries (Defs' Ex. W(4)) which disagreed radically with the results and conclusions testified to by Karcher and shown on Karcher's charts, summaries and graphs. But Kramer did not check the hearsay figures of Karcher, nor did Kramer check the work sheets or cards either of Government's witness Browner, or of the Government's uncalled investigators, Tollette, Ward, and Daly.

The foregoing facts are in striking conflict with the above-quoted conclusion of the learned Circuit Court to the effect that defendants and their witnesses had checked Karcher's figures as to the alleged tax arrears and found that he had been very fair. Defendants' witness Kramer—the only one called by defendants in connection with the alleged tax arrears—testified that he did not know anything about Karcher's figures; that he *had not checked them*, and that he did not agree or disagree with them (6436-7 and 6480). All that defendant Breitwieser testified to, in that respect, was that he had attempted to reconstruct the alleged tax arrears situation, in regard to mortgages in but one series, C-2, from Company records which were admittedly so incomplete on this point and that he was unable to reach a

reliable result (3418-3425). Defendant Williams' testimony that one of his employees had found Karcher's figures fair, *related solely to sales* and reinvestments in Series C-2 (5882-3).

The learned Circuit Court in referring to the above-mentioned Defendants' Exhibit W(4) (pp. 3372-80) said:

> "An exhibit by an expert for the defense—made up in the way appellant here critizes—tallies remarkably with Karcher's charts, particularly when allowance is made for the fact that it does not include the second half for the 1932 taxes."

But the fact that petitioner, in an endeavor to overcome the incompetent hearsay Karcher testimony, charts, summaries and graphs, was forced to offer such evidence as he could with regard to the alleged tax arrears did not eliminate the highly prejudicial effect which said testimony and documents had on the minds of the Jury and did not cure the error which had been committed. Petitioner was certainly entitled, in the face of this incompetent hearsay evidence, to attempt to protect himself the best he could.

Furthermore, the finding of the learned Circuit Court that Kramer's Exhibit (Defs' Ex. W(4)) was

> "made up in the same way appellant here criticizes",

is erroneous. The Karcher charts, summaries and testimony were, as pointed out above, based upon alleged investigations by several persons other than the witness Karcher. Only one of these several persons testified, and none of their records, memoranda, or cards, if any existed, were put in evidence or even offered in evidence. On the other hand, Kramer's Summaries (Defs' Ex. W(4)), were, as definitely testified to by Kramer (6402-8), based upon certain Company records *actually in evidence* (Defs' Exs. S(4), T(4),

U(4), R. 2136), being reports made by Lybrand, Ross Bros. and Montgomery (fols. 6402-6). In other words, Kramer's Summaries, petitioner's rebuttal evidence, instead of being based on hearsay were founded *on the records* of the New York Title and Mortgage Company *which were in evidence.*

The conclusion of the learned Circuit Court that, assuming Karcher's hearsay and incompetent testimony, charts, summaries and graphs were erroneously admitted, there should, nevertheless, be no reversal because of

> "lack of a showing of substantial injury",

is, we believe, a shocking conclusion and one which is supported neither by reason nor by *United States* v. *Kelly* (2 Cir. 105 F. 2d. 912, 917) referred to by the learned Circuit Court. The reasoning assigned by our Circuit Court on this point, namely, that

> "the facts could have been brought out in any event by lengthy trial processes",

assumes the very controversial issue of fact in question; and, of course, such a premise if carried to its logical conclusion would dispense with proof altogether,—the sophistry being that because an alleged fact charged in an indictment is capable of proof, therefore it need not be proved.

United States v. *Kelly* (2 Cir., 105 Fed. 2d. 912, 917), cited by our learned Circuit Court, contains nothing which justifies the prejudicial admission of Karcher's hearsay testimony, charts and summaries, or the affirmance of petitioner's conviction. In the *Kelly* case, the Court after holding that inventory of the taxpayer's assets prepared by a Treasury Department accountant, a Government witness, was incompetent and should have been excluded, said:

> "However, it is inconceivable that this error should have controlled the verdict; the inventory referred to a time

> *three years after* the last (tax) return in controversy, and the use made of it does not appear. At worst it would have done no more than show discrepancy between the inventory of 1935 and the earlier years, and there is so much evidence of specific fabrication as would make a reversal for this reason a travesty of justice." (Italics ours.)

The above reasoning by the Court in the *Kelly* case does not apply to the instant case where (1) the prejudicial hearsay Karcher testimony, charts and summaries related to *the very period* covered by the alleged conspiracy and the alleged tax arrears,—1931 and 1932,—and not to a period subsequent to the times charged in the Indictment; and (2) the distorted presentation, by means of the hearsay Karcher testimony, charts and summaries, undoubtedly left an indelible imprint in the minds of the Jury and improperly controlled its verdict in this case.

The other reason assigned by the learned Circuit Court that

> "appellant had the benefit of all the aid in rebuttal which his expert (Kramer) could suggest,"

is equally fallacious. This reasoning, if sound, would permit the prosecution, in any case, to disregard all rules of evidence established to safeguard the rights of an accused, and would permit the reception in evidence of all manner of alleged proof and testimony, in violation of established rules of evidence, on the theory that although the incompetent and hearsay evidence is inadmissible and should be excluded, it may nevertheless be received because the accused can call rebuttal witnesses to refute the same. To advocate and apply to criminal cases such a rule of proof would reduce the trial of an accused from the serious business it is to nothing but a mock proceeding.

The learned Circuit Court suggests that it

> "would have been most expensive, as well as disruptive of the activities of the record offices and burdensome upon the Court",

had the prosecution, pursuant to *Section 382 of the New York Civil Practice Act,* procured Certificates from the City Treasurer with respect to the alleged tax arrears, or had produced a search by a title or abstract company, pursuant to *Section 385 of the New York Civil Practice Act.* But none of these suggested possible inconveniences has, in so far as counsel have been able to determine, ever been held to justify the incompetent hearsay evidence complained of. The prejudicial hearsay evidence cannot be justified (as suggested by our learned Circuit Court) on the ground that it would have been expensive for the Government to produce that type of proof,—if it existed,—which would have eliminated the prejudicial incompetent hearsay feature. Undoubtedly, it *was just as expensive* for the Government to employ the several special agents of the F. B. I., for a period of weeks, to make the alleged examinations and searches of the tax records in the various Boroughs of New York City as it would have been to produce either Certificates from the City Treasurer or Searches by a title or insurance company. But, having decided to use its own several special investigators to examine the tax records with reference to alleged arrears, it was then incumbent upon the prosecution to go all the way and *produce said investigators as witnesses* and proper testimony by them *before* Karcher's testimony, charts and summaries would be competent.

The petitioner's claim is not that secondary evidence, if such existed, of the alleged tax arrears would have been improper; but that until the proper foundation for the same were laid, in accordance with well recognized rules of evidence, such secondary evidence could not be properly

introduced. When it was received it constituted the rankest incompetent hearsay extremely prejudicial to petitioner.

C.

The Cases Cited by the Learned Circuit Court do not Justify the Admission of Karcher's Incompetent Hearsay Testimony, Charts, Summaries and Graphs.

The instant case is not one where the official tax records were either out of the jurisdiction of the Court, or lost. The Federal Court House in the Southern District of New York, where this case was tried, was not over one block from the City Collector's Office for the Borough of Manhattan, New York City, nor over half hour by subway from the City Collector's Office in the other three boroughs where the alleged investigation of the alleged tax arrears is claimed to have been made by Government's F. B. I. special agents. The instant case does not, therefore, come within the rules of *Burton* v. *Driggs* (87 U. S. 125, 136), or *Stephens* v. *United States* (41 F. (2d) 440), or *Galbreath* v. *United States* (257 F. 648, 658), cited by the learned Circuit Court. In fact, in *Burton* v. *Driggs,* where the books and records in question were beyond the jurisdiction of the Court, the results of the examination of the books were proved by the testimony of the *very persons who made the examination.* But in the instant case, Government's witness Karcher did *not make* the examination of the tax records.

The learned Circuit Court cites Sections 1218 and 1230 of *Wigmore on Evidence* (3d Ed.) in support of the asserted admissibility of Karcher's hearsay testimony, charts and summaries. Nothing in *Wigmore* justifies the admission of the Karcher testimony and documents. Section 1218 of Wigmore simply refers to the familiar rule that documents belonging "to any public office need not be produced, but may be otherwise proved." The petitioner has no quarrel

with this proposition. His contention is that Karcher's testimony, charts and summaries concerning the alleged tax arrears did not satisfy the established rules of evidence in such a case, and that the entire body of said so-called proof is nothing more than prejudicial incompetent hearsay. Indeed, Section 1230 of Wigmore (referred to by our Circuit Court) supports petitioner's contention. Referring to voluminous documents *Wigmore* says, at Section 1230:

> "The convenience of trials demands that other evidence be allowed to be offered in the shape of the testimony of a competent witness *who has perused the entire mass* and will state summarily the net result." (Italics ours.)

This Karcher did not, *and could not, do.* Only the several Government investigators,—if any one did,—perused the entire mass of entries, tax data, and official records in the various tax offices of New York City. They are the very persons *whom Wigmore says* should have been called. *But they were not called by the prosecution.*

Re The Spica (289 F., 436) does not sustain the admissibility of the incompetent hearsay Karcher testimony, charts and summaries on the ground that Karcher was the supervising agent. The rule laid down in the *Spica* case is that, in proving the activities of a large business the rule that a witness should speak only of matters of personal knowledge, on which he can be cross examined, will be relaxed when necessity exists, such as *where the witness cannot be found or cannot be produced in court.* In the instant case, the activities of a large business were not being investigated; instead, the several Government investigators who were not called had been specially engaged by the prosecution to *help in the preparation of the instant case for trial.* Furthermore, their addresses were known; and they could have been produced by the Government; only one was called; another was at the trial, but was not called by the Government.

Neither *Massachusetts Bonding Insurance Co.* v. *Norwich Pharmacal Co.* (18 F. 2d. 934), nor *United States* v. *Cotter* (60 F. 2d. 689, 693) justifies the admission of the incompetent hearsay Karcher testimony, charts and summaries. The rule applied by our Circuit Court in both of these cases, related solely to the method of proving entries made *in the regular course of business.* In the *Cotter* case, the question was whether ledger sheets of a bank in which certain accounts were kept, were, in themselves, competent. But these cases, as well as *United States* v. *Becker* (62 F. 2d. 1007), and *E. I. DuPont de Nemours & Co.* v. *Tomlinson* (296 F. 634, 640), relate solely to the question of *the foundation* which must be laid before proof of the contents of the records, *kept in the regular course of a large business enterprise,* may be received in evidence.

D.

The Circuit Court of Appeals in Holding that the Incompetent Hearsay Testimony Charts, Summaries and Graphs of Government Witness Karcher Relating to Alleged Tax Arrears were Properly Received in Evidence, has so far Sanctioned a Departure, by the Lower Court, from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's power of supervision.

The Great Northern Railway v. *Washington,* 300 U. S. 154;
Shepard v. *United States,* 290 U. S. 96;
Burton v. *Driggs,* 87 U. S. 125;
Queen v. *Hepburn,* 11 U. S. 290.

POINT III.

The learned Circuit Court of Appeals' construction and application of recent Federal Statute Title 28 U. S. C. A. Sections 695 and 695-h was erroneous.

A.

The Recent Federal Statute, Title 28 U. S. C. A. Section 695.

In sustaining the admission of Karcher's incompetent hearsay testimony, charts, summaries and graphs, relating to the alleged tax arrears, our learned Circuit Court of Appeals relied on the recent statute Title 28, U. S. C. A. Section 695 which is set forth in the Petition herein at page 3.

In its Opinion of affirmance our learned Circuit Court said:

> "Obviously this rule loses none of its force by reason of the passage of the recent statute 28 U. S. C. A. section 695, under which writings and records made in the regular course of any business, where it is the regular course of such business to make them, are admissible in any court of the United States. See Ulm v. Moore-McCormack Lines, Inc., 2 Cir., 115 F. 2d, 492, 117 F. 2d, 222."

B.

The Fallacious Argument of the Circuit Court.

The learned Circuit Court reasoned that the Karcher testimony, charts, summaries and graphs objected to, were properly admitted under the provisions of the above quoted Statute. The reasoning being (1) that Karcher, in pre-

paring his charts, summaries and graphs as part of his work as a Government witness in the preparation of the instant case for trial, was engaged in a "business or profession" within the meaning of the Statute; and also (2) that Karcher's charts, summaries and graphs were "a memorandum or record of any act, transaction, occurrence or event" within the meaning of the Statute.

The statement of the foregoing proposition resulting from the learned Circuit Court's interpretation and application of the Statute to the instant case, is sufficient to demonstrate its fallacy. An examination of the application of the Statute as set forth by our Circuit Court of Appeals in *Ulm* v. *Moore-McCormack Lines* (115 F. (2d) 492), cited in the Opinion of affirmance, contains nothing which justifies the proposition and interpretation which the Circuit Court gave the Statute in the instant case. Instead, the whole tenor of the interpretation of the Statute by the Court, as expounded in *Ulm* v. *Moore-McCormack Lines,* is contrary to the application and interpretation of the Statute as made in the instant case.

The uncontrollable dangers which would inevitably follow from such a loose and radical interpretation as that given to the Statute by the learned Circuit Court in the present case, in order to sustain the admission of the prejudicial hearsay Karcher testimony, charts, summaries and graphs, relating to alleged tax arrears, is apparent without extended argument. Such a construction makes competent, as evidence, all types of charts, graphs, tabulations, memoranda, notes and writings which might be made by any Government *attorney, investigator, detective, accountant,* or *special agent,* assigned as part of the Prosecutor's staff, to help prepare any indictment for trial against an accused. In other words the Prosecutor's own staff may, under this construction of the Statute, prepare charts and memoranda, as a part of their preparation of an indictment for trial,

and these writings or memoranda would be received in evidence against the accused, at the trial, on the pretext that they were writings made in the regular course of business--*the sole alleged business of the persons making the writings or memoranda being that of helping the Prosecutor in preparing for trial of the accused.* Under such a rule of evidence, any person accused of any crime would be absolutely defenseless against the mass of data, charts, graphs, summaries and memoranda that could be assembled by the Prosecutor and received in evidence against him.

The construction and application by the learned Circuit Court of the above cited Federal Statute is so radical and prejudicial to the fate of every accused person, as well as to the liberty of this petitioner, as to require review by this Court of the judgment of affirmance. Certainly, such an important and far reaching proposition involving a question of Federal law should first be settled by the highest Court of the land before it has become a part of our criminal jurisprudence.

Not one of the cases cited by the learned Circuit Court of Appeals, including *Ulm* v. *Moore-McCormack Lines* (115 F. 2d. 492; 117 F. 2d. 222), or *Northern Pac. Ry. Co.* v. *Keyes* (91 F. 47, 58), or *United States* v. *Cotter* (60 F. 2d. 689, 693), supports the propostion laid down by the learned Circuit Court in the instant case with regard to the applicability of the above Statute.

The learned Circuit Court also applied the same interpretation of the Statute to the *several aides* of Karcher, most of whom were not called; and expressly held that Karcher's aides *were acting in the regular course of a business* and that the writings or records which they made, as a part of their alleged examination of the tax records, were writings or records made *in the regular course of business* within the meaning of the Statute. In other words, the learned Circuit Court held that said aides, the Govern-

ment's special F. B. I. agents, were also engaged in a *"business, profession or occupation"* within the meaning of the Statute, and that the notes and memoranda which they made while investigating the tax records were within the meaning of the *"writing or record"* referred to by the Statute. This reasoning is as fallacious as the parallel reasoning which the Court applied to Karcher's charts, summaries and graphs. But the reasoning when applied to Karcher's aides fails on another score—*none* of the writings, records, memoranda, or cards containing their notes of their alleged examinations of the tax records of the City of New York was received into evidence; in fact, they were not even offered by the prosecution. Therefore, as far as the writings and records of Karcher's aides are concerned, the question of the applicability of the Statute does *not arise* in the instant case,—although the learned Circuit Court actually assumed that it did, and rendered its decision of affirmance in part *on that basic erroneous assumption.*

For the reasons above stated, the decision of the learned Circuit Court should be reviewed by the Supreme Court of the United States.

C.

***Northern Pac. Ry. Co.* v. *Keyes* (91 Fed. 47; 8 Circuit), Distinguished.**

Northern Pac. Ry. Co. v. *Keyes, supra,* referred to by our learned Circuit Court, does not sustain the Court's construction and application of Title 28 U. S. C. A. Sec. 695. In that case: (1) the information contained in the tables and computations was gathered from the books and records of the Northern Pac. Ry. Co. and other railway companies who were the plaintiffs in said actions, (2) said books and records were kept in the regular course of the

business of the plaintiffs, (3) the tables were compiled by about 50 clerks who were regular employees of the plaintiff railway companies, (4) all the records on which the tabulations and computations (received in evidence) were based were placed by the plaintiffs at the disposal of the defendant, (5) all the way bills and other records of the plaintiff railway companies from which said tabulations and computations were made were actually in the building where the testimony was taken, (6) all of the 40 or 50 clerks who made the tabulations and computations from their examination of the plaintiffs' books and records were also present in the building at the time the testimony was taken, (7) counsel for the plaintiffs made available to counsel for defendant all of the 40 or 50 clerks, employees of the plaintiff railway companies, for cross examination, and (8) invited counsel for defendant to call any of the clerks for the purpose of such cross examination.

Every one of the foregoing facts is wanting in the instant case. The foregoing facts present in *Northern Pac. Ry. Co.* v. *Keyes, supra,* indicate its complete dissimilarity from the instant case, and discloses that the *Northern Pac. Ry. Co.* case simply represents an early application of the rule (which was followed by some of the Circuit Courts of Appeals prior to the enactment of Title 28 U. S. C. A. Sec. 695), that it is sufficient to show that entries which are contained in books of a large business establishment were kept in the regular course of business without producing the particular persons who actually made the entries and having them identify the entries.

POINT IV.

The learned Circuit Court of Appeals for the Second Circuit, in construing Title 28 U. S. C. A. Sections 695 and 695-h, has rendered a decision herein in direct conflict with the decisions of the Ninth Circuit Court of Appeals.

Section 695-h of Title 28 U. S. C. A. provides:

> "Sec. 695-h: *Prospective nature of chapter.* Section 695 * * * shall be prospective only, and *not retroactive.*" (Italics ours.)

The indictment in the instant case was found *June 7th, 1935. The above Statute was approved June 20th, 1936.* By its terms, therefore, it is *not applicable* to the instant case. Assuming, but not admitting, that the interpretation of Sec. 695 of the Statute by our learned Circuit Court is the correct one, it has no application to the instant case because the indictment against petitioner was found *more than a year prior to the passage and approval of the Statute.* So held in *Greenbaum* v. *United States,* 98 F. 2d. 574 (C. C. A. 9), and *Shreve* v. *United States,* 103 F. 2d. 796 (C. C. A. 9).

The learned Circuit Court of Appeals for the Second Circuit, in construing and applying Title 28 U. S. C. A. Sections 695 and 695-h, has rendered a decision in direct conflict with the above decisions of the *Ninth* Circuit Court of Appeals.

POINT V.

As stated in the opinion of the learned Circuit Court of Appeals Second Circuit herein there is direct conflict between our Circuit Court and the Sixth Circuit Court of Appeals.

Our learned Circuit Court of Appeals in sustaining the ruling of the Trial Court admitting Karcher's incompetent hearsay testimony, charts, summaries and graphs relating to the alleged tax arrears said:

> "The only possible reason for asserting that these authorities are not quite controlling is that these cannot be business entries, since they were made in preparing evidence for this trial; and, indeed, the case of *Morton Timber Company* v. *United States,* 6 Cir., 91 F. 2d. 884, 889, does say, as a ground for affirming a ruling made below, that entries 'made apparently for exclusive use as evidence in this case were therefore not in the regular course of business'" (p. 3501).

In *Morton Timber Company* v. *United States, supra,* stated by our learned Circuit Court of Appeals as *a conflict case,* the tally sheets and calculations in question were, in fact, made by Holt and Latham and were based upon the estimates of six to ten timber estimators, who went out on timber cruises to estimate the quantity of timber in dispute. Latham testified that he supervised the work of the estimators, that he himself made no estimates of the quantity of timber in a tree, and made no tallies. He merely supervised the work of the cruise. The tally sheets of the cruise were sent to Knoxville where Latham looked them over. The plaintiffs, in *Morton Timber Company* v. *United States,* offered in evidence the calculations made from the tally

sheets, and also a copy of the summary of purportedly all of the tally sheets. The Trial Court excluded the evidence as hearsay. The Circuit Court of Appeals, Sixth Circuit, affirming this ruling said:

> "We think the evidence rejected by the trial court falls within no exception to the hearsay rule.
>
> "The tally sheets and the calculations therefrom were not entries made in the regular course of business. On the contrary, they were made apparently for *exclusive use as evidence in this case.*
>
> * * * * *
>
> "The action of the District Court, in refusing to admit the evidence tendered to show the results of the Holt and Latham cruise is approved."

In the instant case the tax office books and records alleged to have been examined by the four F. B. I. agents,—Browner, Tollette, Daly and Ward,—in connection with the alleged tax arrears,—were not books and records kept by any of the parties to this action, but were the books and records of a *third party,* namely—the City Collector of the City of New York; and neither Karcher nor any of the four F. B. I. investigators kept said books and records, made any of the entries therein, nor had any connection whatever with them; nor were any of the tax clerks, who made entries therein, produced.

The error in admitting Karcher's incompetent hearsay testimony, charts, summaries and graphs relating to the alleged tax arrears, is not sustained by the facts or reasoning in *United States* v. *Cotter* (60 F. 2d. 689, 693, 2d. Circuit), cited by the learned Circuit Court of Appeals in its Opinion herein. In the *Cotter* case bank deposit slips of the defendants themselves and ledger sheets from the banks in which the defendants kept their accounts were received in evidence

for the purpose of enabling the Prosecutor to trace to the defendants, in that case, some of the proceeds of the shares of stock sold. *In the instant case neither the tax records nor any transcripts of the tax records were offered or received in evidence.* Instead, the incompetent hearsay evidence consisted of Karcher's testimony, charts, summaries and graphs based on something entered on some cards by the several F. B. I. investigators, only one of whom was called and who testified that he called off something from the records of the various City Collector's offices of four (4) of the boroughs of New York City, and that Tollette put something down on the cards (2439-40).

The reasoning of Cardozo, *J.* in his dissenting opinion in *Great Northern Railway Co.* v. *Washington* (300 U. S. 154, 168-174), referred to by our learned Circuit Court in its Opinion, was directed to the particular facts present in that case, and does not justify the prejudicial error committed by the receipt in evidence of the incompetent hearsay Karcher testimony, charts, summaries and graphs on the question of alleged tax arrears.

In *Queen* v. *Hepburn* (11 U. S. 290) Marshall, *Ch. J.* said, page 295:

> "It was very justly observed by a great judge that all questions upon the rules of evidence *are of vast importance* to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.
>
> One of these rules is, that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its ex-

clusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." (Italics ours.)

Point VI.

The learned Circuit Court of Appeals in construing and applying Title 28 U. S. C. A. Sections 695 and 695-h, has decided an important question of Federal law which has not been but should be settled by this Court; and has decided it in such a way that the public interest will be promoted by prompt settlement in this Court of the questions involved.

From the foregoing it appears that the important recent Federal Statute *28 U. S. C. A. Secs. 695 and 695-h,* which involve the question of the admissibility of evidence, in both civil and criminal cases, has not been before this Court for construction; that there is clear conflict between the decision of our learned Circuit Court of Appeals herein and the decisions of the *Eighth Circuit Court of Appeals* on the question of whether the Statute is retroactive as to indictments found *prior to* the enactment of the Statute; that, apart from the Statute, there is direct conflict, as stated by our learned Circuit Court of Appeals in its Opinion of affirmance herein, between the Second Circuit Court of Appeals and the *Sixth Circuit Court of Appeals* (*Morton Butler Timber Co.* v. *United States,* 91 F. 2d. 884), and that this conflict is not resolved by the able dissent of Mr. Justice Cardozo in *Great Northern Railway Co.* v. *Washington* (300 U. S. 154), in which case this Court, in its majority Opinion, sustained the Supreme Court of Washington in affirming the Trial Court's rejection of incompetent hearsay testimony offered in that case.

The question presented is not only one of conflict between the decisions of different Circuit Courts of Appeals, but one which is thoroughly unsettled on an important question of Federal law which constantly arises in the trial of both civil and criminal cases. The entire situation is one which requires review by this Court to settle the grave questions involved, both under the recent Statute and apart from the Statute.

POINT VII.

An erroneous ruling which relates to the substantial rights of a party is ground for reversal, unless it affirmatively appears from the whole record that it was not prejudicial.

McCandless v. *United States*, 298 U. S. 342;
Williams v. *Gt. Southern Lumber Co.*, 277 U. S. 19, 26;
United States v. *River Rouge Co.*, 269 U. S. 411, 421.
Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 82.

A.

In the instant case it *does not affirmatively* appear from the whole record that the rulings of the Trial Court compelling petitioner on cross examination, over objections and exceptions, to testify that he did not accept an invitation to appear before the Federal Grand Jury investigating this case were not prejudicial to petitioner and did not deprive him of a fair trial.

B.

It does not affirmatively appear from the whole record that the erroneous admission in evidence of Karcher's

incompetent hearsay testimony, charts, summaries and graphs relating to alleged tax arrears was not prejudicial to petitioner and did not deprive him of a fair trial.

The application of the above well-settled principle to the erroneous admission of *hearsay evidence* was made by this Court in *Williams* v. *Gt. Southern Lumber Co., supra,* upon *certiorari* (275 U. S. 511) to the Circuit Court of Appeals, Fifth Circuit. In that case the *hearsay evidence* erroneously introduced was testimony by the wife of the deceased to the effect that she heard one Carson say that "they had come to kill Lem Williams, and they killed him." This Court, in an Opinion delivered by Mr. Justice Sanford, said in that case:

> "There was a direct conflict in the evidence as to whether Carson had been with the party at the time Williams was killed; the weight of the evidence being to the effect that he had been sent to another part of the city and had arrived after the killing. But, however this may be, the statement made by him as to the purpose the party had in coming, made after the killing had taken place and when the conspiracy, if one had existed, had accomplished its purpose, *was hearsay,* not part of the *res gestae,* and not admissible against the Company.
>
> 3. * * * *The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company.* * * * an error which relates, not merely to formal or technical matters, but to the substantial rights of the parties 'is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.' *United States* v. *River Rouge Co.,* 269 U. S. 411, 421. Here it cannot be said from the entire record that the errors were harmless; but on the contrary

they were material and of a highly prejudicial character." (Italics ours.)

This Court again applied the above-stated principle to the admission of *incompetent hearsay* testimony, in the case of *Shepard* v. *United States* (290 U. S. 96), certiorari to the Circuit Court of Appeals Tenth Circuit granted in 289 U. S. 721. In that case the incompetent hearsay testimony was the dying declaration of the deceased to the effect that she was "dying of poison given by her husband." This Court, in an opinion by the late Mr. Justice Cardozo, reversing a judgment of conviction which had been affirmed by the Circuit Court of Appeals for the Tenth Circuit, said at page 104:

"This fact, if fact it was, the Government was free to prove, but *not by hearsay* declarations. It *will not do to say that the jury might* accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. *Discrimination so subtle is a feat beyond the compass of ordinary minds.* The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. *When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.* Thayer, Preliminary Treatise on the Law of Evidence, 266, 516; Wigmore, Evidence, Sections 1421, 1422, 1714." (Italics ours.)

C.

It *does not affirmatively* appear from the whole record that the Trial Court's denial of petitioner's motion to

dismiss, made at the close of the Government's case, because the Conspiracy Count does not charge a crime as a matter of law, was not prejudicial to petitioner and did not deprive him of a fair trial.

A mere reading of the Conspiracy Count (Fourteenth Count) shows conclusively that it sets up an undisclosed and vague scheme without referring to, or incorporating by reference, the scheme alleged in the thirteen (13) substantive counts of the indictment. In substance, the Conspiracy Count merely alleges that defendants conspired and used the mails. It does not reveal what the scheme was. The insufficiency of the Conspiracy Count is not supplied or cured by the Government's Bills of Particulars. Petitioner's motion for a Bill of Particulars on the Conspiracy Count *was denied* (121 i. and 123). It does not indicate the nature of the charge against the defendants, and it is so vague, indefinite and uncertain that it should have been dismissed when appropriate motions were made at the close of the Government's case (3052-90). The motions were denied, and exceptions taken.

In support of petitioner's contention that this Count is fatally defective we deem it sufficient to point to the following decisions of this Court which squarely hold that a Conspiracy Count of this vague and indefinite nature, without specifying the facts constituting the offense, cannot stand (*United States* v. *Hess,* 124 U. S. 483; *United States* v. *Carll,* 105 U. S. 611; *United States* v. *Cruikshank,* 92 U. S. 542; *Pettibone* v. *United States,* 148 U. S. 197).

Obviously, the purpose of inserting the Conspiracy Count in the indictment was to afford the Prosecutor the great latitude in the presentation of evidence that is permissible under a Conspiracy Count; and it is undoubtedly the fact that the Trial Jury, which convicted petitioner on the *defective Conspiracy Count,* would have acquitted him on

the thirteen substantive mail fraud counts if the insufficient Conspiracy Count had been dismissed,—as it should have been.

POINT VIII.

CONCLUSION.

For the reasons stated in this petition and in this brief it is respectfully submitted that the application for writ of certiorari should be granted.

Respectfully submitted,

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THEODORE KIENDL,
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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 72

GEORGE T. MORTIMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 3494–3501) is reported at 118 F. (2d) 266.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 2, 1941 (R. 3501). The petition for writ of certiorari was filed May 6, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also rule XI of the

Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, when the credibility of the accused as a witness is in issue, he may be asked on cross-examination if he had declined an invitation to testify before the Grand Jury.

2. Whether reversible error resulted from the admission of certain evidence objected to as incompetent hearsay, the evidence being cumulative and the guilt of the accused established overwhelmingly by other competent evidence.

3. Whether the conspiracy count was fatally defective for indefiniteness and uncertainty.

STATEMENT

An indictment in fourteen counts was returned in the United States District Court for the Southern District of New York against the petitioner and five other officers of the New York Title and Mortgage Company, together with that company and certain of its subsidiary corporations (R. 19–40). The first thirteen counts charged substantive violations of the mail fraud statute (Criminal Code, Sec. 215; U. S. C., Title 18, Sec. 338); the fourteenth a conspiracy to violate that statute (Criminal Code, Sec. 37; U. S. C., Title 18, Sec. 88).

It was alleged in the indictment that the defendants devised a scheme and artifice for the obtaining

of money and property by means of false and fraudulent pretenses, representations, and promises, in connection with the sale of mortgages and certificates issued, sold, and distributed by the New York Title and Mortgage Company, and that the representations were made by means of newspaper advertisements, circulars, letters, and in other ways.

After a trial which lasted twelve weeks (R. 8, 14), verdicts of guilty were returned on various counts against petitioner and two of the other defendants (R. 14, 2477). Three of the substantive counts had been dismissed by the Government (R. 11).[1] Petitioner was convicted on eight of the substantive counts and on the conspiracy count and was sentenced to two years' imprisonment on each count, to run concurrently, and on the conspiracy count was, in addition, fined $5,000 (R. 2, 14, 16–17, 2477, 2484). Petitioner is the only defendant who appealed.

The New York Title and Mortgage Company was engaged in the lending of money on the security of mortgages on real estate in Metropolitan New York and the sale of such mortgages or of certificates of participation therein to the public. It continued in business until March 14, 1933, when the New

[1] Of the three remaining individual defendants, one pleaded guilty (R. 9, 47), one died prior to trial (R. 8, 43), and one was acquitted (R. 14, 2477). The indictment was dismissed as to the corporate defendants (R. 14–15, 2478–2479).

York Superintendent of Insurance prohibited its further sale of securities (R. 475). On August 4, 1933, he took the company over for rehabilitation (R. 1317). Petitioner was the president of the company from June 1, 1930 (R. 1562), to December 1, 1932 (R. 1596), continued to receive his salary as president until June 1, 1933 (R. 1596), and served as a director for some time after he had resigned as president.

The company engaged in an intensive and aggressive selling campaign during 1931 and 1932, its advertising outlay for these two years exceeding $240,000 (R. 476). This campaign was carried on through newspaper advertising (R. 2557–2726), circular letters (R. 57, 2727a), pamphlets (R. 123–124), and salesmen (R. 48–57, 169–176). The entire campaign sought to convey to prospective purchasers one basic idea: that the company's mortgages and mortgage certificates were adequately secured and eminently safe. Playing upon the distrust of securities by small investors following 1929, such expressions were used as "An Investment Over 150 per cent Secure—Every Dollar you Invest in our Five per cent Guaranteed First Mortgages and Certificates is secured by a first lien on improved New York Real Estate worth more than one and one-half times the amount of the mortgage" (R. 2600); "The bond of a responsible borrower protects you against the possibility of loss" (R. 2724); "*guaranteed* safety of principle and unfailing income" (R. 3194); "legal investments for

savings banks in the State of New York" (R. 2530–2531); "the ideal investment for trust funds" (Exs. 383, 384, 387); "depression-proof" R. 2560); "storm-proofed" (R. 2724).

However, as the Circuit Court of Appeals said, "these assurances were quite false" (R. 3495). The company was insolvent or in a condition approximating insolvency for many months before petitioner resigned as president on November 30, 1932. In June 1931 real estate values declined drastically (R. 2084). In November 1931 the company invoked a clause permitting it to delay payment on participation certificates after maturity,[2] unpaid calls accumulated rapidly (R. 650–652), and petitioner admitted that by the beginning of 1932 the company's financial situation had become alarming (R. 1731–1732, 1735–1756). Nevertheless the sale of certificates continued to be energetically pushed on representations of absolute safety (R. 3194). All of this was forcibly brought home to petitioner at the time (R. 2823–2843).

Despite the representations made in the company's advertising, certificates continued to be issued against mortgages which had already fallen into default and which subsequently had to be

[2] After the company had invoked the delayed payment clause, the company, on instructions of petitioner and other officers (R. 1378), was repurchasing certificates in the open market at discounts ranging from five to thirty percent (R. 3074), and reselling them to the public at par (R. 653–654).

foreclosed (R. 605–606, 607, 609). By the end of 1932 the percentage of defaults in four group issues ranged from 65.8 percent to 91 percent (Exs. 691, 700, 703, 714). A large part of these were a year or more in default.

The existence of defaults was purposely concealed both from prospective purchasers (R. 1462, 1959) and salesmen (R. 165, 172–173). Specific inquiries were answered equivocally or falsely (R. 1459–1462). For instance, a certificate holder's question, "Are any of the mortgages upon which these certificates are founded in default or under foreclosure?" (R. 3179) was answered, as to one of his certificates, "If a mortgage deposited under this issue is foreclosed, it is removed from deposit and a mortgage in good standing is substituted" (R. 3177) at a time when over $9,000,000 in mortgages of this series were under foreclosure, assignments of rents, or in arrears (Ex. 692).

Although the advertising literature emphasized that the properties mortgaged were always worth 150 per cent of the amount of the mortgages on the basis of current appraisals (R. 79, 165), on instructions from petitioner and others (R. 508) appraisals were signed by persons who were wholly unfamiliar with the properties. Members of the appraisal staff inserted figures far in excess of their opinion of true valuations (R. 699, 819, 822–823). The officers arbitrarily fixed figures for appraisers to arrive at (R. 700, 822–823). Appraisals were "jacked-up" (R. 900) and generally "the appraisal

was fixed to justify the loan" (R. 518). Petitioner and others raised appraiser's figures (R. 507–508) and directed that appraisals be furnished customers higher than those on the company's records (R. 1403–1405, 1535–1536).

The power of substitution of collateral provided for in the certificates and represented as necessary to permit the withdrawal of foreclosed or paid-off mortgages from group series (R. 2551, 3177) was utilized to permit the sale of the good mortgages to astute purchasers (R. 190, 1928–1929), leaving those which were unsaleable (R. 1176). Similarly, when collateral was necessary for a loan from the Reconstruction Finance Corporation in September 1932, several million dollars of mortgages were withdrawn from the group series and other collateral, rejected by that Corporation, substituted (R. 394), thereby leaving the certificate holders very much less secure than before the loan was made (R. 1245).

Title to property acquired by the company on foreclosure was taken in the name of one of two wholly-owned subsidiaries organized by the company for that purpose (R. 248). These subsidiaries and their activities were under the sole direction of petitioner (R. 1725–1726). When the properties were taken over in this manner, new mortgages were issued on *pro forma* appraisals which again purported to show that the property had a value of one and one-half times the amount of the mortgage (R. 879, 880–886, 900, 906), although pe-

titioner would have been glad to dispose of such properties at the face value of the original mortgages (R. 1721). The parcels the company was able to sell were disposed of at substantial losses (R. 1723).

The practice of the company often belied its statement in its advertising that "The bond of a responsible borrower protect[s] you against the possibility of loss" (R. 2724). For instance, one $2,500,000 bond, payable on demand, was made by a married employee of the company receiving $35 per week (R. 226), having no interest in the property (R. 225), who testified that he "did not have a penny" (R. 227). It was the practice for the landholding subsidiaries to take title to properties on foreclosure and assign them to a "dummy" who simultaneously executed a bond and mortgage and reassigned the property to the subsidiary (R. 534–535). These subsidaries were managed by petitioner (R. 1592, 1725–1726).

Petitioner received a salary of $50,000 a year as president of the company (R. 1560). He and his family owned certain of the company's certificates, but none of them were in any of the issues involved in this case (R. 1696). While president he held no stock of the New York Title and Mortgage Company, having exchanged his shares in 1929 for stock of the Manhattan Company, which at that time acquired 98.5 percent of the stock of the mortgage company (R. 1040, 1536–1537). Although in October 1932, the Manhattan Company issued stock of

the New York Title and Mortgage Company to its stockholders as a stock dividend (R. 1537, 1595), petitioner did not have the shares to which he was entitled transferred to his own name because he did not think ~~its~~ their value justified the cost of the stock transfer tax stamps (R. 1595).

ARGUMENT

I

Petitioner contends (Pet. 16–22) that it was error to permit the Government to cross-examine him concerning his failure to accept an invitation to testify before the Grand Jury (R. 1649–1652). No inquiry was made into the motive or reason for his refusal.

As the Circuit Court of Appeals held, "The question was properly allowed since it was relevant to the issue of appellant's credibility" (R. 3497). The purport of petitioner's entire defense was that, although he was the president of the New York Title and Mortgage Company, he was entirely ignorant of any wrong-doing perpetrated in its name. (See R. 3496.) Since the validity of this defense depended largely upon the weight to be given to petitioner's own testimony, it was entirely proper for the Government on cross-examination to attack his credibility by contrasting his defense with his failure to accept the invitation to tell the grand jury his side of the case. When petitioner took the stand at his trial, his immunity against self-in-

crimination no longer survived. *Raffel* v. *United States,* 271 U. S. 494, 499; *United States* v. *Buckner,* 108 F. (2d) 921 (C. C. A. 2d), certiorari denied, 309 U. S. 669; *Tomlinson* v. *United States,* 93 F. (2d) 652 (App. D. C.), certiorari denied, 303 U. S. 646; *Commonwealth* v. *Smith,* 163 Mass. 411, 430–433.[3]

Petitioner's argument that to permit cross-examination of the type here in question would prevent a defendant from testifying on his own behalf at the trial unless he had previously testified before the grand jury (Pet. 17) is but a paraphrase of a contention rejected by this Court in the *Raffel* case, *supra,* that the questions there complained of "might operate to bring pressure upon the accused to take the stand on the first trial * * * and might influence the defendant to continue his silence on the second trial because his first silence may there be made to count against him." As this Court said, "these refinements are without substance." 271 U. S. at 499.[4]

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[3] Certain factual distinctions which petitioner attempts to make between the first three cases and the present case (Pet. 18–19) are obviously without moment.

[4] If, as petitioner intimates, the jury was permitted by the Government's cross-examination to draw any unwarranted inference from the petitioner's failure to accept the Government's invitation to testify before the grand jury because the Government did not inquire into the reason for such failure (Pet. 19–20), the fault lay with petitioner, since, on redirect examination, he could have clarified the matter.

II

Petitioner assails, as incompetent hearsay, testimony of the Government's witness Karcher and the charts, summaries, and graphs introduced through him insofar as they related to tax arrearages because (1) Karcher's subordinates who examined the official tax records and transcribed data upon which Karcher's compilations were partially based did not all testify and (2) the tax records from the various county collectors' offices were not introduced in evidence (Pet. 22–45).

We do not believe it necessary to consider the sufficiency of the considerations adduced by the Circuit Court of Appeals to sustain the admissibility of the questioned evidence (R. 3495–3501).[5]

[5] Petitioner's argument that the Circuit Court of Appeals erroneously held that Karcher's testimony was made admissible by 28 U. S. C. Section 695 (Pet. pp. 35–44) is based upon an obvious misconstruction of the court's opinion. The court said: "There are numerous cases holding admissible on the testimony of a supervising agent statements compiled from voluminous records according to a method at once practicable and affording reasonable guaranty of accuracy, even though the supervisor had not examined each record himself" (R. 3499). After citing a number of cases in support of this proposition the court went on to say: "Obviously this rule loses none of its force by reason of the passage of the recent statute, 28 U. S. C. A., Section 695, under which writings and records made in the regular course of any business, where it is the regular course of such business to make them, are admissible in any court of the United States" (R. 3499–3500). It is apparent that the court did not base its decision on Section 695, but merely pointed out that its conclusion was consonant with that statute.

In our view, it is clear that if the evidence was inadmissible, petitioner's substantial rights were not infringed.[6]

(a) Karcher's testimony as to tax arrearages was merely cumulative. The company's records showing the tax status of each piece of mortgaged property involved were introduced in evidence (Exs. 364, 364A, 364B, 364C). Where there was a discrepancy between the records of the taxing authorities and those of the company, Karcher chose whichever showed the lesser tax deficiency (R. 564). Hence, his testimony added nothing to what was already in evidence except insofar as he showed that the tax collector's records revealed less tax arrearages than the company's own records. Such testimony was obviously favorable to petitioner.

(b) Laying aside all proof of tax arrearages, the misrepresentations alleged in the indictment were established by an abundance of other competent evidence. As has been shown in the Statement, mortgages and participation certificates were sold after the company was hopelessly insolvent; from 65.8 percent to 91 percent of the mortgages held by the company were in default; appraisals were arbitrarily "jacked-up" to justify loans; unsaleable mortgages were placed in group issues and those

[6] There is, consequently, no necessity for discussing the alleged conflict between the decision of the Circuit Court of Appeals below and that of the Circuit Court of Appeals for the Sixth Circuit in *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884, 889, relied upon by the Petitioner (Pet. 41–42).

that later proved to be saleable were withdrawn and inferior collateral substituted; properties taken over on foreclosure were arbitrarily listed at one and one-half times the amount of the mortgage when they were actually worth less than that amount; and bonds which were supposed to protect certificate purchasers "against the possibility of loss," many of them for enormous amounts, were but the obligations of low-salaried judgment-proof "dummies", employees of the company itself. Indeed, petitioner does not dispute the fraudulent nature of the enterprise and does not here urge, as an independent ground for reversal, that he was but an innocent participant.[7]

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[7] While the petitioner in a summary of the facts and in his reasons for the allowance of the writ refers to his good faith and asserts that his conviction rested upon nothing more than suspicion (Pet. 7–8, 11–12), these assertions are not incorporated in his specification of assigned errors to be urged (Pet. 14–15) nor discussed in his argument (Pet. 16 *et seq.*). There was abundant evidence from which the jury could conclude that the petitioner was a knowing participant in the fraudulent scheme. The by-laws of the company provided that "The president of the company shall be the administrative officer of the company and shall manage its operations and perform all the duties incidental to his office" (R. 1562). It was shown, among other things, that petitioner received reports covering every phase of the company's affairs, including arrears and defaults (R. 296, 1745, 1749–1750, 2255), foreclosures (R. 316, 1682, 1741–1742, 1745, 1748, 1749–1750), assignments of rents (R. 288, 1741–1742, 1745, 1747–1748, 1750), operations of foreclosed properties (R. 1687), daily sales and re-investments of mortgages and certificates (R. 1751–1752), itemized lists identifying all mort-

III

Petitioner argues (Pet. 48) that count 14, the conspiracy count, "is so vague, indefinite, and uncertain that it should have been dismissed." It is clear, however, that this count was well pleaded. It alleges a conspiracy occurring during a designated period and at a designated place to use the mails in furtherance of a scheme and artifice for the obtaining of money or property by means of false and fraudulent pretenses, representations, and promises, "particularly from any and all persons who would be induced to part with money and property for the purchase of mortgages and certificates issued, sold, and distributed by the said New York Title and Mortgage Company." Twelve specific overt acts are recited (R. 34–38).

---

gages as saleable or unsaleable (R. 626–627), and "trouble sheets" (R. 296, 300). A large part of the company's advertising appeared over his name (R. 127), and it was testified that all advertising was submitted to him before publication (R. 120, 123–124). After surveying all the evidence regarding petitioner's knowledge of and participation in the affairs of the company the Circuit Court of Appeals was moved to declare: "* * * indeed the question he raises as to its sufficiency seems hardly sincere" (R. 3496). Even if the evidence had been less convincing, "One who shows himself as an officer [in a company] promoting * * * fraud * * * can hardly object when the jury holds him an active participant in it." *United States* v. *Bob*, 106 F. (2d) 37, 40 (C. C. A. 2d), certiorari denied, 308 U. S. 589; see also *United States* v. *Dilliard*, 101 F. (2d) 829, 835 (C. C. A. 2d), certiorari denied, 306 U. S. 635.

That petitioner could not have been misled as to the precise nature of the scheme charged is evident from the facts that the first six of the twelve overt acts consist of the mailings charged in the first six substantive counts (R. 25–28) and that the first of these substantive counts recites the fraudulent scheme in great detail (R. 19–23). This was supplemented in further detail by bills of particulars pointing out the particular mortgages involved and the respects in which the representations were false and fraudulent (R. 41a–41ff). No attack was made on the conspiracy count until the close of the Government's case, when *pro forma* motions were made to dismiss all counts of the indictment on the ground of insufficiency (R. 1418 *et seq.*).

The conspiracy count did not omit any essential element of the offense; it sufficiently advised the petitioner of the charge against him; and the petitioner is adequately protected against a second prosecution. Cf. *Hagner* v. *United States,* 285 U. S. 427, 431; *Rosen* v. *United States,* 161 U. S. 29, 34; *Cochran and Sayre* v. *United States,* 157 U. S. 286, 290.

CONCLUSION

The case presents no question requiring review by this Court. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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OCTOBER TERM, 1941

No. 72

GEORGE T. MORTIMER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1941

GEORGE T. MORTIMER, Petitioner, v. THE UNITED STATES OF AMERICA, Respondent.	No. 72

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement

A major question presented upon the petition is

"Whether the Circuit Court of Appeals erred in its construction and application of the Federal Conspiracy Statute, Title 18, Sec. 88 U. S. C. A.?" (Pet. 8*).

This question is the core of reason "6" urged by petitioner for allowance of the writ (Pet. 10-11), and is specified as assigned error "5" (Br. 10). Petitioner's argument thereon is briefly stated in subdivisions "IV" and "V" of the Petition (11-12).

Consideration of this question involves an examination into the facts, as they relate to petitioner. Petitioner's contention, in this connection, is that the entire Record establishes his innocence, and that the learned Circuit Court's affirmance of his conviction is due, in part, to an erroneous construction and application of the Federal Conspiracy Statute (Title 18, Sec. 88 U. S. C. A.) and of *United States* v. *Dilliard* (101 F. 2d 829, 2 Cir.), and *United States* v. *Bob* (106 F. 2d 37, 2 Cir.).

* Reference and Citations to the Petition, Brief and Government's Brief are pages, in each instance.

The prosecution, fully conscious of petitioner's unjust conviction, devotes a very major portion of its Brief herein to a final attempt to sustain that conviction.

The Government in urging that the Record establishes that petitioner participated in the alleged frauds and conspiracy claims (1) That the Company engaged in an intensive selling campaign, during 1931 and 1932, in the course of which certain alleged false representations were made (Gov. Br. 4-5), (2) that the petitioner participated in the making of said false representations (Gov. Br. 5), (3) at a time when the Company was, to the knowledge of petitioner, insolvent, (4) that the existence of defaults and arrears as to guaranteed mortgages and certificates were purposely concealed (Gov. Br. 6), (5) that, upon instruction from petitioner (and others), the current appraisals of the real estate, against which guaranteed mortgages and mortgage certificates were issued, were raised or "jacked up" (Gov. Br. 6-7), (6) that the Company's power of substitution of collateral, provided for in the case of group series certificates, was improperly used so as to impair the mortgage security protecting the certificate holders (Gov. Br. 7), (7) that certain subsidiary corporations, wholly owned by the Company, took title to properties acquired by the Company on foreclosure and that against these properties the Company made new mortgage loans on appraisals in excess of the actual value of the properties (Gov. Br. 7), and, finally, (8) the alleged practice of the Company in using "dummy" bondsmen (Gov. Br. 8).

A fair, dispassionate, and complete examination of the Record—even of those fragments relied on by the Government—discloses petitioner's innocence of the frauds and conspiracy charged, and of the grave injustice and error committed by the learned Circuit Court in applying the principles of *United States* v. *Dilliard, supra,* and *United States* v. *Bob, supra,* to the facts of the instant case, as they relate to petitioner.

POINT I

The petitioner, manager of the physical real estate properties of the New York Title and Mortgage Company, during 1931 and 1932, did not knowingly participate in the alleged frauds and conspiracy.

A

As to sales and the company's alleged false advertising.

The uncontradicted proof is that the acquitted defendant Shields was in charge of sales (R. 49*; 50; 53). Shields was head of the Sales Department, and was, in turn, responsible to defendant Williams, the General Manager and Chief Executive Officer. Williams testified that in supervising the Sales Department *he* kept in touch with the Company's sales force, addressed special meetings of salesmen, and gave them instructions to carry out in selling mortgages and certificates (R. 1941; 1946-47); also, that *he* (Williams) instructed defendant Burdett, in March 1932, to make an investigation of group series F-1, B, K, Q, and C-2 for the purpose of determining whether the Company should continue the sale of certificates against mortgages deposited in those group series (R. 5526-34); and that although *he (Williams)* knew, in 1932, about tax defaults he permitted sales of guaranteed mortgages and certificates to continue (R. 5687-89); except that in March, 1932, after conference with defendants *Burdett*, and *Kahler*, and with the Company's Treasurer, *Obermeyer*, further sales in group series C-2 were stopped (R. 5525-35; 5542-46; Defts'. Ex. M (2); 9973). Government witneess Hawkwood stated that it was defendant *Williams* who, either directly or through Eitelbach, gave Hawkwood instructions with respect to salesmen (R. 55, 57). *Williams* testified he received

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*References and citations to the Record (R), are by folio, unless otherwise indicated.

all reports, and kept himself fully informed as to what was going on (R. 5808-9).

The Record is barren of any proof that petitioner directed or participated in the activities of the Sales Department, or that he had anything to do with any of the sales to the alleged victims. Government witnesses Baruch and Hawkwood both testified that sales were not under the supervision of petitioner (R. 509; 142-177). The proof does not, even remotely, connect petitioner either with the specific sales charged in the indictment, or with the Company's sales generally through its Sales Department.

Petitioner did not prepare or authorize the particular advertising and sales literature referred to in Government's Brief, at page 4 (consisting of certain newspaper advertising (R. pp. 2557-2726), circular letters (R. pp. 57, 2727A) and pamphlets (R. pp. 123-4). As to the newspaper advertising complained of (Gov. Ex. 418) the proof is uncontradicted that about August 1930 (shortly after petitioner became President) the entire advertising for the Company was taken over by the Manhattan Company (the New York Title Mortgage Company having become a unit of the Manhattan Company about December, 1929), and that all advertising for the Company was prepared in the Central Advertising Bureau of the Manhattan Company, 40 Wall Street, New York City, under a Mr. Alexander, assisted by a Mr. Foster and a Mr. Tuttle (R. 5409-10). The Government produced no printer's proof of these newspaper advertisements (Gov's. Ex. 418) which are either okayed or initialed by petitioner.

True, petitioner prepared certain specific types of newspaper advertising which he approved as the type of advertising the New York Title and Mortgage Company should use (Defts'. Exs. U (2), V (2), W (2), and X (2), pp. 3334-41). This type of advertising, which was not produced or offered by the prosecution, was widely published and used by the Company (Defts'. Exs. Y (2), and Z (2); pp. 3342-54). The following (Defts'. Ex. V (2)), which

is typical of the only advertising ever approved or prepared by petitioner, is definite documentary refutation of the charge against petitioner:

"GUARANTEED
MORTGAGE INVESTMENTS

From $100 up

NEW YORK TITLE
AND MORTGAGE COMPANY

135 Broadway 295 Madison Avenue"
(R. p. 3336).

The circular letters referred to (Gov's. Br. 4), being Gov's. Exs. 427 (R., p. 2727 a) and 434 (R. 476-88), were neither prepared by petitioner, approved by him nor sent out with his knowledge or consent. Government's Exhibit 427 was a Company jacket design for enclosing interest checks, and consisted, in part, of a circular letter, dated April 30th, 1932, addressed "to the holders of our guaranteed first mortgage securities"; the evidence being that the printed matter was prepared by Government witness Tuttle and submitted to his superior, Mr. Alexander, of 40 Wall Street, head of the Advertising Department of the Manhattan Company; and that, upon being approved by Alexander, was, like other circular letters (Gov's. Exs. 431, 432, 433, 1055 and 1056 A) sent out by a letter servicing agency which signed petitioner's name to the circular letter, upon Alexander's instructions (R. 451-2). Petitioner testified that he had not approved this circular letter (Ex. 427) before it went out. He was positive, after seeing it in Court, for the first time, that he would not have okayed or approved it had it come to his attention (R. 5004-6).

Government witness Tuttle testified, with respect to Government Ex. 434,—a circular mimeograph letter, dated March 28, 1932, addressed to Walter Hinkle,—that it was not signed by petitioner (R. 482). Petitioner never saw this mimeographed circular letter before it went out (R. 4923-4),

although several hundred copies, returned to the Company because wrongly addressed, came to his attention *later on* (R. 4995-5001). This particular copy of the mimeograph letter (Gov. Ex. 434) was returned to the Company by the addressee, Mr. Hinkle, who wrote a long hand memorandum on the face thereof to the effect that his mother had lost some $15,000 in "guaranteed real estate mortgages," stating further "I will say she did not have any investments in your company." This circular letter, after it came back from Mr. Hinkle, was referred to petitioner, who wrote a notation (on the back of the letter) addressed to "E. H. H." (E. H. Habinghorst, an employee of the Company), suggesting that some one see Mr. Hinkle and explain to him the difference between a guaranteed mortgage and a bond issue.

Gov. Ex. 1055 (R. p. 3194), a circular letter, dated March 14, 1932, referred to in Government's Brief, at page 5, was not signed by petitioner but bore a lithograph of his signature (R. 1658). There is no evidence that petitioner authorized this circular letter, or the use of his lithograph signature thereon, or had anything whatever to do with its preparation and distribution.

The pamphlets referred to in Government's Brief, at page 4, represented by Government's Exhibits 419, 420, 421 (R. pp. 122-4), were titled "Ideal Investment." There is absolutely no proof that petitioner had anything to do with the preparation or distribution of "Ideal Investment." This pamphlet was prepared about 1920 by Edgar J. Levey, one of the ranking officers of the Company at that time, and had been used by the Company for 10 years prior to the time petitioner became President (R. 5407-8). Government witness Tuttle testified "I do not know of any changes. There may have been minor changes" (R. 365); and, with respect to some minor changes which had been made in the pamphlet, in 1932, that the same had been submitted to defendant Shields, in charge of the Sales Department, or to Mr. Ackerman one of his subordinates (R. 365-7).

B

The company's alleged insolvency.

The Government's contention that the Company was insolvent during 1931 and 1932 is not supported by the testimony of Government witness Obermeyer, Treasurer of the Company, or the documentary proof (Pet. 6-7). Mr. Frederic J. Fuller, who succeeded petitioner on December 1, 1932 as President of the Company, made a thorough investigation of the financial condition and affairs of the Company before he agreed to accept the presidency (R. 5969-71). Mr. Fuller, at the time, was a senior vice president and the trust officer of the Central Hanover Bank and Trust Company, New York City, a sound banker with wide experience in trust investments. The investigation, which he personally made, convinced him that the Company was financially sound and that he could properly and safely become its President (R. 5969-71; 6059-65).

The fact that, in November, 1931, the Company invoked the 18 months delayed payment clause contained in specific series certificates is no proof of the Company's alleged insolvency. The Company, by doing what it had a right to do, in accordance with the provisions of the specific* mortgage certificates, was exercising a measure of caution and good judgment at a time of nationwide economic stress and depression. And the evidence is that every holder of the group series guaranteed mortgage certificates was paid his interest as it became due up to January 1st, 1933; and that all holders of group series certificates had also been

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*The guaranteed mortgage certificates were sold either in group series or specific series. A specific series consisted of a single mortgage, deposited with the Depositary, against which certificates were sold. Certificates in specific series contained a provision giving the Company an 18 months grace period within which to pay the principal amount of the certificate after it became due. This provision was known as the 18 months deferred payment clause. Group series certificates were issued against group mortgages deposited with the Depositary, the Company having the right to substitute different mortgages in place of the mortgages originally deposited as collateral for the certificates. Certificates issued in the group series did not contain any deferred payment provision.

paid the full amount of their certificates as and when they became due in every case where the certificates, properly endorsed and accompanied by the necessary documents, had been presented for payment. Such was the testimony of Government's witness Obermeyer (R. 1274-6). Furthermore, the fact is that the Company's checks had actually been drawn and were ready to go out for payment on December 31, 1932 (thirty days after petitioner had resigned as President), to all certificate-holders who were entitled to their money on January 1st, 1933; but the new President, Mr. Fuller, gave orders, at the last minute, that these checks should not be sent out (R. 1297-8). The Company, up to January 1st, 1933, made all payments due and payable to certificate-holders, in the specific series, in accordance with the terms of said certificates. It is true that the Company, in accordance with the terms and provisions of the specific series certificates, enforced the above-mentioned 18 months deferred payment clause; but, as Government witness Obermeyer testified, every single person whose specific certificate was due and the 18 months clause had elapsed had been paid through December 1932 (R. 1298-1303; Gov. Exs. 511, 513).

Pressing its charge that the Company was insolvent, to the knowledge of the petitioner, the statement is made (Gov. Br. 5) that "petitioner admitted that by the beginning of 1932 the company's financial situation had become alarming (R. 1731-1732, 1735-1736)." Examination of the portions of the Record cited discloses that petitioner made no such statement or admission. What the petitioner did state was that *"our foreclosures* in 1931 had reached an alarming point" (R. p. 1731); and that, "it was not until February, 1932, that we really became alarmed" (R. 5204, p. 1735). Most businessmen of sound judgment, when they saw first England, and then the United States, go off the gold standard and economic conditions get gradually worse in 1932, did become, as did petitioner, alarmed (R. 5195-6). But the Government's attempt to translate this alarm into

alleged insolvency of the Company is an argumentative feat which has no factual foundation.

The Government, further pressing its claim of the alleged insolvency of the Company, states (p. 5 of its Brief) that "All of this was forcibly brought home to petitioner at the time (R. 2843)". This reference is to Gov. Exs. 519, 520 and 521, which are confidential forecasts written in pencil by the Company's Treasurer, *Obermayer,* in the Spring of 1932, at the special request of defendant *Williams* to whom they were delivered (R. 1010-20). These confidential forecasts were used by defendants *Williams* and *Kahler* in their negotiations for loans from the R. F. C. Neither Obermayer nor any one else ever gave these papers, or a copy of them, to petitioner (R. 4917). Obermayer testified that he respected the request of defendant Williams that these forecasts remain confidential and that he communicated the information therein contained *to no one but Williams* (R. 1398-1400). This corroborates petitioner's testimony to the effect that neither Obermayer, nor any one else, ever gave him a copy of these confidential forecasts (R. 4917).

C

Petitioner neither knew of, nor misrepresented, nor concealed the situation as to defaulted mortgages.

Petitioner did not know that mortgage certificates were being sold against mortgages which were in default as to interest or taxes, nor that mortgages which were in default were deposited against certificates to be sold (R. 4935). Petitioner always understood that as soon as mortgages got in default they were withdrawn from the Group Series (R. 4935).

The numerous Reports (Gov. Exs. 1063, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1077, 1078, 1079, 1081, 1082), made to petitioner in connection with *the rental and management* of the vast quantity of real estate

acquired by the Company on foreclosure or operated under assignments of rent, contained no information as to what mortgages were in Group Series or as the condition of the mortgages in the various Group Series.

Petitioner had nothing to do with the deposit or substitution of mortgages in Group Series. Government witness Obermayer, the Company's Treasurer, testified that he (Obermayer) was the one who was charged with making deposits of mortgages in Series, and of withdrawing and making substitutions thereof (R. 1231-2; 1270). Obermayer informed defendants *Kahler* and *Williams* of these withdrawals and substitutions (R. 1286-7), but not petitioner. The Government (Gov. Br. 7) makes special reference to the alleged improper substitutions of mortgages made in order to provide collateral for a loan by the Reconstruction Finance Corporation to the Company, in September, 1932. But here, as in the case of other charges made against petitioner, the Record,—even that part cited by the Government (R., pp. 394; 1245)—exonerates petitioner. The fact is, as testified to by Government witness Obermayer (R., pp. 394-6), he (Obermayer) discussed with defendants *Williams* and *Kahler* (but not with petitioner) the necessity of withdrawing mortgages from Group Series to be used as collateral for the proposed R. F. C. loan and of making substitutions of other less desirable mortgages in place of those withdrawn. Obermayer further testified:

> "I conferred with the RFC in picking out the mortgages that would act as collateral security for the loan. They accepted or rejected them as they were submitted. I alone conducted negotiations as to what mortgages would be submitted to them" (R. 1268-9) * * * "We furnished additional statements of collateral at different times, for additional loans. Each time I conducted the negotiations we gave them collateral that would be satisfactory to them, after they had fixed the exact amount of the loan they would give us. If a mortgage which was to be sent to the Reconstruction Finance Corporation was in a series, *I would take it out and put in another in its place*" (R. 1270). (Italics ours.)

The letter referred to in Government's Brief (p. 6), advising certificate holders that "If a mortgage deposited under this issue is foreclosed, it is removed from deposit and a mortgage in good standing is substituted", was written by defendant *Shields* (Gov. Ex. 1016; p. 3177). Petitioner never authorized that information as to the condition of mortgages or certificates be withheld from investors; instead, as early as January, 1931, he instructed that all correspondence and inquiries be answered promptly by letter, and that, if the information requested could not be immediately given, receipt of the investor's letter should be acknowledged immediately and a date given when the correspondent might expect a further and complete reply (Defts'. Ex. (0) (2); R. pp. 3327-8).

D

Petitioner did not make, or direct that false appraisals be made.

Appraisals were made by the Loan Committee after examination of the property by the Loan Officer and Appraiser, defendant Brietweisser, or one of his assistants, based on his reports and recommendations to the Committee. Breitweisser testified that appraisals were his problem; that he looked into the matter and decided what the values were, and that he then took the matter up with the Loan Committee which acted upon his reports. On some occasions the values of the appraiser were modified by the Committee. The testimony of Government's witness Shapiro, Chief Appraiser for the Company, contradicts the Government's contention that the appraisals were false or in any way improper (R. 2515-16). If there was a disagreement, *Brietweisser* had the final say in the Committee. *His figure would be the final figure* (R. 2516). The citations in Government's Brief (pp. 6-7), to what are claimed to be excessive, false or "jacked up" appraisals are found, on examination, to relate to valuations made or recommended

by Brietweisser (R., pp. 699; 819, 900), and *Shields* (R., pp. 700; 822-823; Gov. Ex. 797; p. 3109). There is no evidence, as claimed by the Government (Gov. Br. 7), that petitioner raised the figures on any appraisal. The substance of the testimony of Government witness Van Anden (R., pp. 507-8) is not that the petitioner *"raised"* the appraiser's figures, but that he (Van Anden), believed defendants Brietweisser, Kahler, Williams and Mortimer went out to look at the properties to make appraisals thereof before they "changed" the appraisals by Shapiro (R., pp. 507-8; fols. 1520-3). It is significant that Government witness Benjamin Shapiro, the Company's Chief Appraiser who testified at length (R. 2077-2109; 2452-2611) concerning the alleged false, "raised", and "jacked up" appraisals, *did not once,* in the course of his extensive testimony, state, or even intimate, that any appraisal had been raised, jacked up or increased by petitioner, or upon instructions from petitioner (R. 2077-2109; 2452-2611).

E

Title to foreclosed acquired properties and new mortgages thereon.

The charge is made that titles to properties acquired by the Company on foreclosure, were taken in the name of wholly-owned subsidiaries organized for that purpose (Gov. Br. 7). The fact is the Insurance Law of the State of New York limited the amount of real estate that the Company itself could own. This necessitated the creation of corporate subsidiaries (Land Estates, Inc. and Liberdar Holding Corporation), when unusually large acquisitions of real estate, by foreclosure and deed, became necessary in order that investors of the Company be protected.

The Company, through its wholly owned subsidiaries, bid in the properties and obtained control over them, the Company paying tax arrears, reconditioning the properties and operating them until sold, meanwhile paying the interest to

certificate holders (R. 1347). In some cases the Company, after one of its subsidiaries had acquired title to such foreclosed property, made a new mortgage loan against the property and sold mortgage certificates against the new mortgage. The applications by the corporate subsidiaries for mortgage loans were in all respects treated exactly the same as applications made by outside persons (R. 1216; 1347). Transactions between the Company and its subsidiary corporations were recorded on the Company's books and reflected in its Reports to the Insurance Department of the State and in the Company's condensed balance sheets. Such an open and practical handling of a difficult situation in times of great emergency and general economic upheaval, in an effort to protect investors, is no proof of conspiracy and does not constitute fraud (*United States* v. *McNamara*, 91 F. 2d 986, 990).

The Government's further charge that petitioner was a party to the granting of new mortgages to the subsidiary corporations upon improper appraisals is unsupported by the entire Record, as well as by Government's particular citations to the Record (Gov. Br. 7; R. pp. 1725-6; 879; 880-6; 900; 906). Petitioner's position and duties in connection with the subsidiary corporations is misconceived by the Government. Petitioner had charge of the *management of the physical properties* acquired by the subsidiaries on foreclosure or operated under assignments of rent. But the placing of new mortgages on these acquired properties were matters handled by others in the course of the Company's *mortgage loan business.* True, petitioner sat on the Executive Committee which passed upon some of the mortgage loan applications on Land Estates and Liberdar. But there is no evidence of any fraud practiced by petitioner in these matters. Petitioner did not control Land Estates, Inc. Mr. Ritching supervised the operation of these subsidiaries under petitioner's general direction (R. 4775; 5175-7).

Government's citations to the Record (Gov. Br. 7) do not sustain its contention that petitioner was a party to

the alleged false appraisals claimed to have been made in connection with mortgage loans granted to Liberdar and Land Estates, Inc. At page 879 of the Record (cited by Government), Government witness Springsteen testified with respect to instructions which he received from defendant *Brietweisser* concerning extensions of mortgages. There is not the slightest indication or suggestion by Springsteen that petitioner was consulted or knew anything about the mortgage extensions referred to. Also, at pages 880-886 of the Record (cited by Government), Springsteen refers to instructions contained in Government's Exs. 592 and 841 for fixing the amount of certain loans to Liberdar and to the Jamaica Committee appraisal which was used. This Jamaica Committee was composed of Gardiner, Cotter, and the witness Springsteen (of the Company's Jamaica office) and defendant *Brietweisser* from the Company's New York office (R. 2631). It is to be noted that Government Exhibit 592, referred to by Springsteen, was a letter to Cross, of the Brooklyn office, signed by *Brietweisser;* and Exhibit 841 is a letter from *Brietweisser* to Downing of the Company's Staten Island office. There is no evidence that petitioner had anything to do with the subject matter of this correspondence, or that he had any knowledge of it. Springsteen further testified that Mr. Gardiner, Vice President in charge of the Jamaica office, was his superior and that he reported to him; and that defendant *Brietweisser,* of the New York office, came once a week to the Jamaica office for conferences and Jamaica Committee meetings (R. 2655-6). Springsteen's testimony, at page 900 of the Record (cited by Government) relates solely to the "Payne" loan. The evidence is uncontradicted that there was nothing fraudulent with respect to the "Payne" loan. The special reason for making the "Payne" loan was plainly endorsed and written on the face of the appraisal. This particular loan was made by the Company purely as a business matter for the purpose of securing the future title business of the borrower; and the Loan Committee wrote over the face of

the "Payne" appraisal the notation that the loan was made for "title business" reasons, so as to plainly indicate that the "Payne" mortgage was not to be sold but was to be held in the Company's own portfolio (R. 483-9).

F

Petitioner had no knowledge of and did not sanction the use of "dummy" bondsmen.

The proof is definite that petitioner had nothing to do with the Company's alleged practice of using "dummy" bondsmen. In a few instances socalled "dummy" bondsmen were used by the Legal Department, under the supervision of defendant *Burdett,* where the applicants for the loans were either Land Estates, Inc. or Liberdar Holding Corp. The socalled "dummy" bondsmen were employees of the Company; and, as indicated by a Memorandum issued by defendant *Burdett,* "dummy" bondsmen were obviously used for the purpose of saving the Company the expense which would have otherwise been incurred had dummy bondsmen not been used instead of the corporations (R. 5935-6; 5942; Gov. Ex. 1114, R. p. 3242). But this use, by the Title Closing Department upon instructions of defendant *Burdett,* law officer of the Company, of individual bondsmen in place of the corporate applicants (Defs'. Exs. C, D, E, F; R. pp. 9826-36) was something petitioner never sanctioned or knew anything about (R. 4706-9). When petitioner first heard about the practice, in December, 1930, he immediately conferred with Mr. Burdett and told him, "that sort of thing *can not be permitted*" (R. 4706).

Petitioner did not stop there. On December 5, 1930 he sent to the various Company departments the following written order (Defs'. Ex. N (2); R. pp. 9976-8; fols. 4706-7) giving instructions *against the use* of "dummy" bondsmen:

> "I find it is a practice for certain employees to act as 'dummy' incorporators, *mortgage bondsmen* and purchasers in real estate conveyances, etc. While this

practice is somewhat widespread, existing as it does in all offices, it has never had the approval of the Management.

"Recently, several instances have come to our attention wherein employees have been placed in the anomalous position of defendants in law suits. In one case, New York Title and Mortgage Company brought foreclosure suit against a corporation, two of whose directors are employees of New York Title and Mortgage Company. These two directors may have to be placed on the witness-stand as representing the defendant company.

"Not wishing a repetition of such embarrassing experiences, please direct your officers and department heads to instruct employees *not to act as 'dummies' in any transaction.* (Italics ours.)

(signed) GEORGE T. MORTIMER
President"

Petitioner's prompt action in giving written orders, on December 5th, 1930, "that employees were not to act as 'dummies' in any transaction," effectively negatives the charge that petitioner participated in the alleged frauds and conspiracy.

POINT II

The record itself establishes petitioner's innocence; the fact that he was associated with other defendants, officers of the company, does not justify an inference of petitioner's guilt.

The foregoing, page by page, and folio by folio examination of the evidence,—including that part of the Record cited and relied on by the Government,—establishes that petitioner did not knowingly participate in the alleged frauds and conspiracy. The conclusion is inescapable: petitioner's conviction rests upon nothing more substantial than suspicion,—arising solely from the fact of his association, as an officer of the Company, with Kahler, Williams, Bur-

dett, Brietweisser, and Shields, the five men who actually carried on the Company's *mortgage loan and certificate business.* Government, in foot note 7 (Gov. Br. 13), refers to the Company's by-law provision to the effect that the President of the Company was its administrative officer and managed its operations. But these *paper* functions of petitioner are not the realities with which we are dealing, and Government's reference to this particular by-law is but illustrative of the fact that neither the duties of petitioner nor his position in the Company were correctly designated by his official title or the formal by-laws. Advantage is taken of the fact that petitioner had the title of "President" to create the impression that he was the responsible, managing and directing head of the Company. But such was not the fact, as the foregoing analysis (pp. 3-16, this brief) of the Record establishes.* The responsible head of the Company,—its Chief Executive Officer, the Chairman of the Executive Committee, and General Manager *was Williams,* who represented the Manhattan Company which controlled the New York Title Mortgage Company through ownership of its stock.

In fact, a Resolution adopted, April 23, 1931, at a meeting of the Executive Committee (Deft's. Ex. O-2) empha-

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*Government's statement, contained in footnote 7 (Gov. Br. 13-14), to the effect that "petitioner received reports covering every phase of the company's affairs" is an incorrect statement of petitioner's position. The phases of the Company's business, or affairs, *covered by the indictment* (R. 55-112) are the making of alleged fraudulent mortgage loans, alleged fraudulent sales, by use of the mails, of guaranteed mortgages and certificates secured by these loans, and an alleged conspiracy to defraud the public thereby. As heretofore pointed out in this Brief (pp. 3 to 16), petitioner took no active part in the Company's mortgage loan and certificate business during the period in question, 1931-32. Instead, petitioner was actively engaged in managing the physical properties comprising the $200,000,000 worth of the Company's distressed real estate. Examination of the Company Reports referred to in those portions of the Record cited by the Government in footnote 7 (Gov. Br. 13-14) discloses that these Reports did *not relate to the mortgage loan or mortgage certificate* business of the Company. They did relate to the subject matter of arrears and defaults on properties which had been foreclosed or were being foreclosed (Gov. Exs. 489, 490, 491, 1068, 1076, 1077, 1078, and 1079), and to the foreclosure actions against mortgaged premises (Gov. Exs. 498, 1057, 494, 1064, 1065, 1066, 1067, 1068, 1069, 1079, 1071, 1072, 1073, 1074, 1076), and the assignments of the rents of the distressed

(*footnote continued*)

sizes the very negligible part which petitioner had in the actual management of the Company (R. 4714-6). The substance of this Resolution is set forth in a letter (Deft's. Ex. P (2)) of instructions to officers of the Company, stating:

> "At the regular monthly meeting of the Company's Board of Directors, held on Tuesday, April 21, 1931, *Mr. H. Pushae Williams,* Chairman of the Executive Committee, was elected General Manager, thus making him the Company's chief executive officer.
>
> "All officers are directed to confer with Mr. Williams relative to the Company's executive activities, as occasion may require.
>
> HARRY A. KAHLER,
> Chairman of the Board.
>
> GEORGE T. MORTIMER,
> President" (9985-9987).
> (Italics ours.)

The learned Circuit Court of Appeals states, with respect to petitioner's association with the other officers of the Company:

> "He conferred regularly with them on all matters of general importance, and received frequent reports on

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real estate under petitioner's management (Gov. Exs. 308-A to 308-H, inc., 494, 490, 1071, 1072, 1073, 1074, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1076), and to the operation of the physical properties which the Company had taken in on foreclosure (Gov. Ex. 1058). But none of these voluminous Reports which were made to petitioner to aid him in the management of the real estate acquired and being acquired by the Company, contained any information as to what mortgages were in either the group series or specific series against which certificates were being sold. Even Gov. Ex. 1076 relating to sales and re-investments was simply a statement of total sales for the weekly period covered and contained no information as to the condition of the mortgages or certificates sold. Nor did the Reports, or lists, which purported to identify mortgages as salable or unsalable (Gov. Exs. 412, 535, 536, 537) show that those mortgages which were designated as "unsalable" were actually being sold. In fact, the plain implication to petitioner was quite the contrary. The socalled "trouble sheets" (Gov. Exs. 489, 490, 491) contained no information concerning the condition of the mortgages in specific or group series against which certificates were being sold. Petitioner's conviction cannot rest, as Government contends, on the fact that he was a recipient of a vast quantity of information through numerous Company Reports made to him. The crux of the inquiry is: what was the subject matter of these Reports and what information did they convey the petitioner? Analyses of the Reports show that ***they gave the petitioner no information concerning the matters charged in the indictment.***

all aspects of the Company's business. These facts alone would be sufficient to justify an inference that he was not unaware of practices so customary as those demonstrated, or conditions of such general significance. *United States* v. *Dilliard,* 2 Cir., 101 F. 2d 629, 835, certiorari denied 306 U. S. 2 Cir. 106 F. 2d 37, 40, 125 A. L. R. 502, certiorari denied 308 U. S. 589, 60 S. Ct. 115, 84 L. Ed. ———."

Contrary to the above statement, an inference of petitioner's guilt is not justified by the fact that petitioner received numerous Reports, because, as herein before pointed out (*supra,* footnote on pp. 17-18), the reports received by petitioner *related solely to the volume of accumulated distressed real estate* which the Company (and its subsidiaries) acquired or managed under assignments of rent (R. 4773; 5060-1; 5352; 5375). The evidence, at most, creates *a mere suspicion* that petitioner might have had guilty knowledge or might have participated in the alleged frauds and conspiracy, by reason of his close association with other defendants; but it does not rise to the level of proof, and is insufficient to convict. (*Mazurosky* v. *United States,* 100 F. 2d 958; *Copeland* v. *United States,* 90 F. 2d 78, 80.) This principle has special application to the petition during the period in question when the Company was engaged *in two separate and distinct activities,*—that of (1) placing mortgage loans and selling guaranteed mortgages and certificates, and (2) operating a large volume of distressed real estate. The Company's mortgage loan business and the sales of its mortgages and certificates were carried on at its main office and at eleven (11) branch offices, with a personnel of approximately 65 administrative officers and 1700 employees. On the other hand, petitioner was mainly engaged *in the second phase of the Company's business—the management of the distressed real estate from the main office.*

With respect to those isolated instances (such as circular letters bearing petitioner's lithographed name) relied on

by the Government, their unrelated character and the infrequency of their occurrence are enough, of themselves, to establish that petitioner had no guilty connection with the alleged frauds and conspiracy. Petitioner's position comes clearly within the principle of,

> *United States* v. *Rabinowich,* 238 U. S. 78;
> *United States* v. *Kissell,* 218 U. S. 601;
> *Graham* v. *United States,* 15 F. 2d 740.

In *Graham* v. *United States, supra,* the Court said:

> "At the end of the trial the question of the sufficiency of the evidence on the conspiracy count was properly raised. The proof discloses a series of *isolated* transactions, and is circumstantial as to all the defendants tried. Conspiracy is a distinct offense from a crime which may be the object of a conspiracy. *U. S.* v. *Rabinowich,* 238 U. S. 78, 85, 35 S. Ct. 682, 59 L. Ed. 1211. There must be shown to be a combination or understanding, tacit or otherwise, to violate a federal statute, *U. S.* v. *Kissel,* 218 U. S. 601, 607, 608, 31 S. Ct. 124, 54 L. Ed. 1168. There is some proof here that one or more of the defendants were guility of what might be termed overt acts, but none that any two or more of them conspired or combined to commit these *isolated* acts or that they were committed in furtherance of any criminal scheme." (Italics ours.)

> *United States* v. *Dilliard* (101 F. 2d 829) *and United States* v. *Bob* (106 F. 2d 37), *cited by the learned Circuit Court, distinguished.*

The Dilliard case: It was undisputed in the *Dilliard case* that the defendant Dilliard, as President, was the "executive head of the *whole business*", and that his duties were the general supervision of the *entire business.* He personally handled the financial matters of the company (State Title and Mortgage Company), a small company with a total capitalization of only $8,300,000.00. Dilliard, personally, made sales. He had actual knowledge of what mortgage collateral was on deposit in the various pools back of the group Series certificates, such as Series "C" and Series "E", and of

the condition of the mortgages in Series. Dilliard, himself, ordered the withdrawal of every one of the 131 mortgages on deposit in group Series "C", and directed the substitution of the defaulted "Victoria Annex" mortgage in Series "C" in place thereof. Dilliard admitted that he knew that defaulted mortgages were in Series. In fact, the very system whereby good mortgages were withdrawn from Series and defaulted mortgages deposited in Series in substitution therefor was set up pursuant to Dilliard's express orders. The evidence in the Dilliard case showed that Dilliard himself gave directions that a certain note described as "Carlton Land Sales Note" be deposited in Series "E" in substitution for mortgages withdrawn, and that Dilliard testified he knew, at all times, that the mortgage collateral securing the Note was less than the amount of the Note. The State Title and Mortgage Co. was insolvent during the entire period in question, and the evidence showed that Dilliard, who personally handled and supervised its financial matters, knew it was insolvent.

The foregoing discloses the sharp distinction between the *Dilliard case* and the instant case, so far as petitioner is concerned. In the *Dilliard case* the substantial body of proof established that Dilliard not only knew of the alleged frauds and conspiracy, but that the same were carried out pursuant to his personal orders and directions. In the instant case, there is no substantial proof that petitioner either knew of or participated in the alleged frauds and conspiracy. All of the substantial evidence is as consistent with petitioner's innocence as with his alleged guilt.

United States v. *Bob, supra,* is also sharply distinguished from the instant case, as appears from the following statement contained in the Opinion of the Court in that case:

> "Admittedly he (Bob) had sent letters to stockholders of the kind cited above, which he knew contained false and misleading statements" (p. 40).

POINT III

There is conflict between the decision of learned Circuit Court of Appeals herein and decisions of other Circuit Courts of Appeals on the construction and application of the Federal Conspiracy Statute.

Petitioner contends that by reason of the facts of the instant case, *as they relate to him*, the learned Circuit Court of Appeals, in affirming petitioner's conviction, has in its construction and application of the Federal Conspiracy Statute, 18 U. S. C. A., Section 88 (Criminal Code Section 37), (a) rendered a decision in conflict with the decisions of other Circuit Courts of Appeals, on the matter (*Graham* v. *United States,* 15 F. 2d 740 (C. C. A. 8); *Weniger* v. *United States,* 47 Fed. 2d 692 (C. C. A. 9); *Dahly* v. *United States,* 50 Fed. 2d 37 (C. C. A. 8); *Mazurosky* v. *United States,* 100 F. 2d 958 (C. C. A. 9); and *Copeland* v. *United States,* 90 F. 2d 78 (C. C. A. 5); and (b) has decided a Federal question in a way probably in conflict with applicable decisions of this Court (*United States* v. *Rabinowich,* 238 U. S. 78; *United States* v. *Kissel,* 218 U. S. 601; *Durland* v. *United States,* 161 U. S. 306). The public interest will be promoted by prompt settlement in this Court of the questions involved.

POINT IV

In criminal cases this Court has power to grant certiorari where the decision of the lower court was erroneous.

The foregoing analysis of the Record leaves no doubt that the learned Circuit Court's decision of affirmance was erroneous. In a *criminal case* this Court has power to grant certiorari, even in non-conflict cases, in order to correct obvious error and because the decision of the Court below was

wrong (*Alfort* v. *United States*, 282 U. S. 687; *Husty* v. *United States*, 282 U. S., 694; *Escoe* v. *Zerbst*, 295 U. S., 490; *McBoyle* v. *United States*, 283 U. S., 25).

The petition should be granted, so that the wrong resulting from the conviction of petitioner may be rectified.

POINT V

Government's Brief does not sustain the conspiracy count.

The cases cited by Government (Gov. Br. 15) do not sustain the conspiracy count as a sufficient pleading. *Hagner* v. *United States* (285 U. S. 427), simply applies the principle that loose or inartificial averments will be disregarded; but that case does not vary the rule which requires that essential elements of an offense must be alleged. The decision in the *Hagner case* turned on the provisions of Sec. 1025 Revised Statutes (U. S. C. A. Title 18, Sec. 556), which provides:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection *in matter of form only*, which shall not tend to the prejudice of the defendant." (Italics ours.)

In the instant case the defect is one of *substance* and not form; accordingly, Section 1025 R. S., and *Hagner* v. *United States* have no application. *Rosen* v. *United States* (161 U. S., 29) dealt with the sufficiency of an indictment charging violation of the statute (R. S. Sec. 3893) against use of the mails for transmitting obscene literature; and *Cochran and Sayre* v. *United States* (157 U. S., 286), with the sufficiency of an indictment charging a violation of *Rev. Stat.* Sec. 5209, against the making of a false entry in a national bank report.

In neither the *Hagner, Rosen,* nor *Cochran and Sayre* case did this Court have before it the question of the sufficiency of a conspiracy count. Government's assertion (Gov. Br. 15), that the conspiracy count is

> "supplemented in further detail by bills of particulars,"

is definitely misleading. The fact is that that part (R. 125 i-123 k) of petitioner's motion which requested a bill of particulars of the *conspiracy count was denied* (R. 121 n-121 u; 122 ff-123 ff). Each count of an indictment is a separate charge (*United States* v. *Albers,* 115 F. 2d, 833); and a conspiracy to defraud by *misuse* of mails is a substantive offense, and is distinct from the offense of merely forming a scheme to defraud by use of the mails for that purpose (*U. S.* v. *Momsen,* 115 F. 2d, 635).

The fact, as pointed out by the Government (Gov. Br. 14), that twelve specific overt acts are recited in the conspiracy count, does not make the count, which is otherwise defective, sufficient. The alleged overt acts are *no part of the conspiracy charge* itself, as a matter of pleading (*Bell* v. *United States,* 2 F. 2d 543, 544); nor can the conspiracy count be aided, as to sufficiency, by the averments found in the overt acts alleged (*United States* v. *Britton,* 108 U. S., 199).

POINT VI

The application for writ of certiorari should be granted.

Respectfully submitted,

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